

***United States Court of Appeals
for the
District of Columbia Circuit***



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CLERK OF THE UNITED
STATES COURT OF APPEALS

JOINT APPENDIX

Docket No. 24895

267
United States Court of Appeals
for the District of Columbia Circuit

FILED APR 26 1971

IN THE
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

United States of America,

Petitioner,

v.

Federal Maritime Commission and
United States of America,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
THE FEDERAL MARITIME COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by United States mail copies of the foregoing Motion for Leave to File Appendix, Time Having Expired and copies of the foregoing Joint Appendix upon the following counsel of record:

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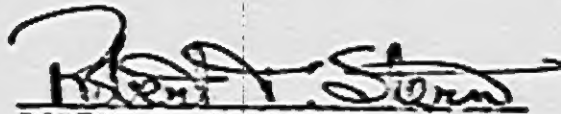
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APR 7 1971

CLERK OF THE UNITED
STATES COURT OF APPEALS



ROBERT T. STERN

Attorney

Department of Justice

Dated: April 7, 1971

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The undersigned are carriers of property (traffic) in containers in containerships in the foreign commerce of the United States in one or more of the ocean trades from, to or between U. S. Atlantic ports on the one hand and Atlantic ports of continental Europe; Baltic and Scandinavian ports; Mediterranean ports and ports of the United Kingdom and Eire on the other. They agree to exchange information and to cooperate in developing information relating to:-

(1) Cost of service, rates, rules and tariffs relating to traffic in intermodal containers;

(2) Practices in connection with the receipt and delivery of traffic in containers, including interchange with connecting land carriers or other transportation of intermodal containers between inland points and ports of loading or discharge from containerships; and

(3) The regularity of traffic flow; the seasonal and other fluctuation of traffic flows, and related data bearing on the level and frequency of service required by shippers.

The purpose of exchanging the information is to determine whether uniform or agreed rules, practices and

procedure, including methods and procedures for the fair and uniform effectiveness or enforcing thereof, are needed to provide to shippers the full benefits of container shipping by adequate container services and to enable carriers to provide such a service; and if it be determined that such uniform or agreed rules, practices, and procedures are useful for that purpose, then to determine whether or not appropriate uniform or agreed rules, practices and procedures may be tentatively formulated and agreed. It is further understood and agreed that the parties hereto will establish adequate procedures for consulting with exporters and importers, including buyers and sellers abroad, for the purpose of obtaining and considering the views and comments of those persons.

Nothing herein authorizes the parties hereto to carry out any agreement which may be reached except upon the prior filing with and approval by the Federal Maritime Commission and/or any other concerned governmental authority of any agreement reached.

Nothing herein is to be construed as obligating any carrier to exchange the information described above, or as limiting the right of any carrier to continue or to make changes in its present rates, rules and practices.

Any common carrier offering container service in the

foreign commerce of the United States as described above may participate in this agreement and resulting discussions upon becoming a party hereto.

This agreement to become effective upon approval by the Federal Maritime Commission pursuant to Section 15, Shipping Act, 1916, as amended.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

BY: [Signature]

ATLANTIC CONTAINER LINE, LTD.

BY: [Signature]

DART CONTAINERLINE ~~INCORPORATED~~ Corp. Ltd.

BY: [Signature]

HAPAG-LLOYD A. G.

BY: [Signature]

SEATRAN LINES, INC.

BY: [Signature]

SEA-LAND SERVICE, INC.

BY: [Signature]

UNITED STATES LINES, INC.

BY: [Signature]

FEDERAL MARITIME COMMISSION
Agreement No. 9899
Filed 9/2/70
Approved _____

September 4, 1970

Atlantic Container Line, Hapag Lloyd and Seatrain Lines consider that the above agreement is not required by U.S. Shipping Act 1916 (Section 15) and the agreement is signed by them without prejudice to their right to discuss matters of mutual interest with other common carriers.

[Signature] [Signature] [Signature]

other common carriers.

APPENDIX, ITEM 2

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RAYMOND P. DE MEMBER
RESIDENT COUNSEL, WASHINGTON

October 1, 1970

Mr. Francis C. Murney, Secretary
Federal Maritime Commission
1405 I Street, N.W.
Washington, D. C. 20573

PROPOSED AGREEMENT NO. 9899

Dear Sir:

On behalf of Meyer Line and Finnliness, we submit the following comments with respect to Proposed Agreement FMC No. 9899.

Proposed Agreement 9899 includes substantially the same parties and the same trade area as the proposed Superconference Agreement No. 9831, and covers many of the same topics. The Superconference Agreement is the subject of a hearing in Docket No. 69-58, presently pending before the Commission, in which Meyer Line and Finnliness are opposing approval of the Agreement. We respectfully request that the approvability under Section 15 of proposed Agreement 9899 be added as an issue to Docket 69-58, in order to determine the purposes, effect and relationship of Agreement 9899 to the Superconference Agreement, including, for example, the questions whether the new Agreement is intended to supersede or supplant the Superconference or to permit effectuation of the Superconference before approval.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By

Sanford C. Miller
Sanford C. Miller

SCM:AVC

Cc: Mr. J. Scott Morrison

APPENDIX, ITEM 3

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ATTORNEYS AT LAW

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F. JOYCE
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BOIKESS
T. STITT
RT W. GINNANE
COUNSEL

October 8, 1970

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1405 I Street, N.W.
Washington, D.C. 20573

Re: Agreements 9899 and 9813

Dear Mr. Hurney:

This refers to Mr. Miller's letter of October 1 relative to Agreement No. 9899. Mr. Miller asks that proceedings relative to the approval of this agreement be "added as an issue to Docket 69-58", in which I represent the parties to the agreement looking towards the formation of the Transatlantic Freight Conference. As the attorney for the respondents in that case, I deem myself entitled to notice -- which Mr. Miller did not give -- of any applications involving expansion of the issues in such proceeding, or for its consolidation with any other case.

Hearings in Docket 69-58 are now scheduled for resumption November 2. The issues under Agreement 9813 (Transatlantic Freight Conference) are on their face wholly different from those in Agreement 9899, and no conceivable reason exists, other than the hope of delay, for any official action looking towards the interconnection of the two agreements or the proceedings involving their approval or disapproval.

Mr. Francis C. Hurney

Page 2

October 8, 1970

The parties to Agreement 9813 oppose the request set forth in Mr. Miller's letter of October 1.

Very truly yours,



George F. Galland

cc: Mr. Levenstein
Mr. Morgan
Mr. Miller

APPENDIX, ITEM 4

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

AGREEMENT NO. 9899, AMERICAN
EXPORT ISBRANDTSEN LINES, ET AL. }

} DOCKET NO.

PETITION OF DEPARTMENT OF JUSTICE

Comes now the petitioner, the Department of Justice, by its attorneys, and pursuant to the Commission's Order, dated September 25, 1970, setting forth notice of the filing of the above-entitled agreement, respectfully states that it has an interest in this matter and respectfully requests that a hearing be held in connection therewith. In support of its request for a hearing, and participation therein, the Department of Justice says:

1. The Department of Justice has standing in this proceeding as an "interested party" under the Commission's order of September 25, 1970. The Department is charged by Congress with the duty of protecting the public interest in a competitive economy. The United States has a direct and substantial interest in preserving competition as a means of obtaining satisfactory shipping services at reasonable

rates, preventing unfairness and discrimination against United States shippers, exporters, importers and ports, fostering the maximum growth and development of United States commerce and preventing detrimental effects upon United States commerce.

2. Section 15 of the Shipping Act of 1916, as amended, provides that the Commission shall disapprove any agreement that it finds "to operate to the detriment of the commerce of the United States, or to be contrary to the public interest." The Department's protest and participation in this proceeding shall be directed to these ultimate issues.

3. The courts and this Commission have held that consideration of the competitive effects of a proposed agreement is an important and necessary step in reaching the public interest determination required by Section 15 of the Shipping Act. Agreements which may produce anticompetitive effects may only be approved under Section 15 if the agreement is necessary to provide other public benefits which outweigh the potential anticompetitive effects. See Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968); Isbrandtsen Co., Inc. v. United States, 211 F.2d 51 (D.C. Cir.), cert. denied sub nom.,

Japan-Atlantic and Gulf Conf. v. United States, 347 U.S. 990 (1954); and Mediterranean Pools Investigation, 9 FMC 264 (1966). In order to make the balancing test required by Section 15, the Commission must have a clear factual understanding of both the competitive effects and other public interest implications of a proposed agreement.

The agreement which is the subject of this proceeding provides for a broad exchange of information and cooperation to develop additional information among all of the major containership operators in the Atlantic Trades between the United States and Europe. Under the agreement information would be exchanged with respect to:

- (1) Cost of service, rates, rules and tariffs relating to traffic in intermodal containers;
- (2) Practices in connection with the receipt and delivery of traffic in containers, including interchange with connecting land carriers or other transportation of intermodal containers between inland points and ports of loading or discharge from containerships; and
- (3) The regularity of traffic flow; the seasonal and other fluctuation of traffic flows, and related data bearing on the level and frequency of service required by shippers.

The purposes of the agreement are vaguely described as

the bringing of "order and stability" into the Atlantic trades by means of providing a "forum" through which carriers can proceed to "an ultimate agreement" of an undesignated sort. The letter submitted with the agreement refers to "inconsistencies" between the practices of carriers, and suggests that the carriers are to develop "uniform standards and practices" of undesignated kinds, which will, in unspecified ways, engender "stability."

Information exchanges among competitors are two-edged swords. In some cases, such exchanges and cooperative efforts to develop additional information and standards of operation may dispel ignorance as to market conditions thereby improving the quality and vigor of competition and providing public benefits in terms of price and quality of service. However, in other cases, information exchanges and attempts to develop standard practices by competitors may eliminate competitive incentives with respect to the pricing, service and technological innovation needed to meet a wide range of shipping needs. See, e.g., United States v. Container Corp. of America, 393 U.S. 333 (1969), American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). In a rapidly developing technological industry such as container shipping, the preservation

of competitive incentives as a means of fostering efficiency is clearly in the public interest.

The information exchange and cooperative efforts are described in the proposed agreement in only the most general manner. Similarly, the purported public benefits allegedly served by the agreement are extraordinarily vague. The type of "stability" to be achieved is unspecified in kind. The parties to the agreement have the burden of establishing that Commission approval of the agreement would be in the public interest. And, in view of the anticompetitive potential of such an agreement, they must provide the Commission with a clear factual predicate upon which approval can be based. Their vague filing clearly does not meet that requirement. Absent the holding of a hearing to develop further information relating to the agreement's potential competitive effects and other public interest implications, the Commission is not in a position to make the public interest determination required by Section 15 of the Shipping Act.

4. The agreement has as present and proposed signatories principal members of the "Superconference" agreement. The commerce covered is the same. The basic subject -- containerization -- is the same. Thus, there

is a close but undefined nexus between the two agreements. Much of the information which carriers have declined to divulge in the pending Superconference proceeding (Docket No. 69-58), on grounds that its release would prejudice their competitive position, they propose to exchange here. The net effect is to have the Commission pass upon a proposal for basic reorganization of the shipping industry without relevant information, while carriers exchange that same information in another proceeding, without clear purposes or goals. If this were to occur, the Commission's authority to pass upon, and provide hearings for, restrictive proposals would be manipulated to maximum advantage for the carriers and maximum disadvantage for the public.

As facts now stand, it seems highly likely that if any information exchange resembling the proposed exchange is to be authorized, it should (a) be transacted within the context of the proceeding in Docket No. 69-58 and (b) be available to public and private bodies engaged in that proceeding.

5. The Department of Justice will desire to participate in any proceedings to determine the justification for the proposed exchange of information, the appropriate scope and duration of any information exchange deemed advantageous to the public, the organizational framework for any information exchange, the

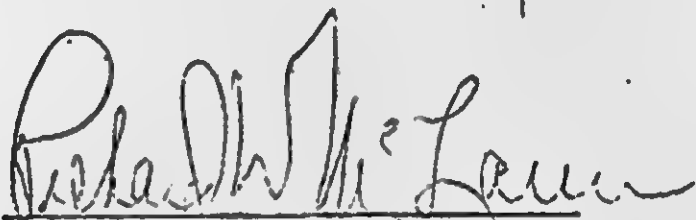
persons to whom the information would be made available, and the uses, in Commission proceedings, of the information interchange.

WHEREFORE, the Department of Justice respectfully requests that a hearing be held on this matter, addressed to the following issues:

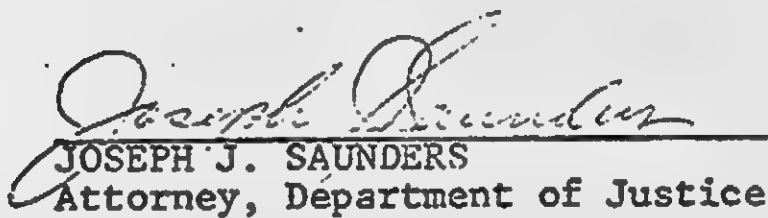
- (1) The sorts of activity to "stabilize" the Atlantic trades and standardize practices currently envisaged by the parties, and the justifications offered for such activities;
- (2) The utility of designated sorts of information interchange for designated purposes;
- (3) Any adverse effects of proposed interchanges of information;
- (4) The relevance of the purposes and activities involved herein to the proceedings involved in Docket No. 69-58, and the most suitable organizational framework for any information exchange which may be authorized; and
- (5) The availability of interchanged information to the Commission, shippers, public agencies, and other members of the public.

The Department requests that it be treated as a party to any such proceeding, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and to be heard upon brief and oral argument if oral argument is granted.

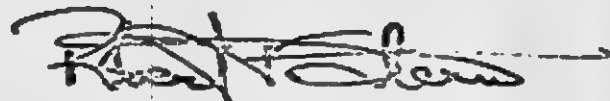
Dated at Washington, D. C., this 15th day of
October, 1970.



RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division



JOSEPH J. SAUNDERS
Attorney, Department of Justice



ROBERT T. STERN
Attorney, Department
of Justice

cc: Robert T. Stern
US Dept. of Justice

APPENDIX, ITEM 5

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MARINE ENGINEERING
MARINE ENGINEERING-STEAM DRIVE SECTION
3145 CENTRAL AVENUE TEL. 244-1100

October 19, 1970

Mr. Francis C. Hurney,
Secretary
FEDERAL MARITIME COMMISSION
1405 I Street, N.W.
Washington, D.C. 20573

Re: AGREEMENT NO. 9899

Dear Mr. Hurney:

Reference is herein made to the captioned filed Agreement before your honorable Commission, which has just come to our attention.

It is our understanding that comments and requests for hearings were due on October 15, 1970. We apologize for our delay in forwarding our request to be permitted to intervene in opposition to said Agreement.

Purposes and intents of the proposed Agreement are unclear and would reflect pursuing a different avenue than that proposed under Agreement No. 9813, which fundamentally was to establish a Super Conference controlling all trades between Atlantic ports as described in both Agreements. This is contrary to the fundamentals and principles of rate-making procedures and would impinge upon the Anti-Sherman Trust Laws.

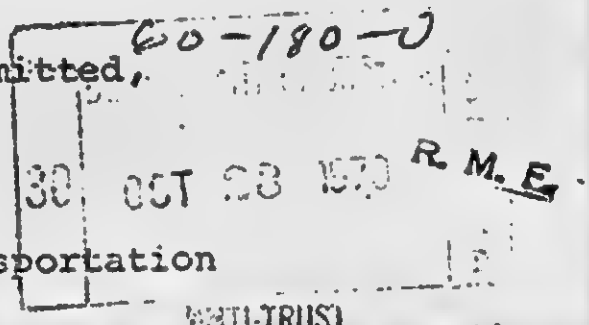
We herewith respectfully advise that we vigorously oppose approval of this Agreement with like vigor as that expressed in Federal Maritime case styled No. 9813.

In view of our tremendous interest in defense of our needs, we respectfully request we be granted leave to intervene despite late filing date.

Respectfully submitted,

J. A. Illes
Director of Transportation

JAI:kmg



APPENDIX, ITEM 6
BEFORE THE
FEDERAL MARITIME COMMISSION

AGREEMENT NO. 9899, AMERICAN
EXPORT ISBRANDTSEN LINES, et al

DOCKET NO. _____

REPLY TO PETITION OF
THE DEPARTMENT OF JUSTICE

The following is submitted on behalf of the signatories in reply to the petition of the Department of Justice, Meyer Line and Finn Line urging that the Federal Maritime Commission hold a hearing on the matter of whether the subject Agreement 9899 should be approved.

The Department argues that:-

"... such exchanges and cooperative efforts (as sought by Agreement 9899) to develop additional information and standards of operation may dispel ignorance as to market conditions thereby improving the quality and vigor of competition and providing public benefits in terms of price and quality of service. However, in other cases, information exchanges and attempts to develop standard practices by competitors may eliminate competitive incentives with respect to the pricing, service, and technological innovation needed to meet a wide range of shipping needs."

There is, of course, no way in which approval of Agreement 9899 "may eliminate competitive incentives" for the reason that any agreement reached in consequence

60-180-321
DEPT. OF JUSTICE
NOV 9 1970

of the activities of the agreement pursuant to Agreement 9899 must itself be submitted to and approved by this Commission before it can be put into effect.

It should also be pointed out that the non-American lines who have signed this Agreement did so with the following stipulation:

"Atlantic Containerline, Ltd., Hapag-Lloyd and Dart Containerline consider that the above Agreement is not required by U. S. Shipping Act 1916 (Section 15), and the Agreement is signed by them without prejudice to their right to discuss matters of mutual interest with other common carriers."

In other words, the non-American signatories maintain the right to discuss amongst themselves any matters covered by this Agreement, and they have signed this Agreement in a spirit of cooperation.

The Department persists in the simplistic notion that international shipping can be adequately regulated by the same standards applicable to the local marketing of milk and eggs. The fact is that Section 15 itself carves agreements between carriers in foreign trade out of the general body of law and provides other and different standards, under the jurisdiction of this Commission, against which such agreements must be weighed.

What is sought by Agreement 9899 is some means by which to bring a semblance of order into an international industry where order is of the highest measure of importance, not alone to the carriers in that industry, but also to exporters and importers here and abroad. The information, for example, to be exchanged is information relating to the operations not alone of U. S.-flag carriers, but carriers of other nations as well; not alone to U. S. exporters and importers but to commercial interests abroad as well. The difficulties in obtaining such information other than through voluntary cooperation provided by Agreement 9899 was described by the Court of Appeals for the District of Columbia Circuit as recently as this month in a case dealing with the self-policing efforts of carriers in international trade:

"... Conferences serving the foreign trade of the United States are by definition engaged in international trade. Records essential to proof of the unlawful rebating (at issue in that case) would undoubtedly be located in the offices of shippers and carriers in many different countries. Many nations have long established policies embodied in statutes against the enforcement of foreign court subpoenas. In addition, certain of these countries have made it clear that records located on their soil are not to be provided the Federal Maritime Commission for use in policing violations of the Shipping Act by individual lines..." [parenthetical comment inserted]

As the Department says, what is involved here is a "rapidly developing technological industry." The need for fair standards in this rapidly developing technological industry should need no exposition. But see, for example, the proceedings before this Commission in Docket 68-8 involving principally the simple question of the scope, purpose and effect of a through bill of lading in international commerce, as evidencing the wide variety of practice and beliefs as between carriers.

As we have noted, any agreement that the parties to Agreement 9899 reach cannot be effected until and unless approved by the Federal Maritime Commission. To the extent that any such further agreement "may eliminate competitive incentives," it is reasonable to expect that this Commission will not approve that further agreement unless the public benefits outweigh that anti-competitive effect. There is, then, no harm that can be done to a competitive economy by approval of Agreement 9899. On the other hand, to disapprove or delay approval, pending hearing, may eliminate entirely the possibility of any agreement to submit for approval or further agreements which in the words of the Department:

"... may dispel ignorance as to market conditions thereby improving the quality and vigor of competition and providing public benefits in terms of price and quality of service ..."

The protestants request consolidation with Agreement 9813. Agreement 9899 is a simple agreement to exchange information to explore various possible alternative solutions in a quest for trade stability. Any consolidation with a conference agreement which may require months of hearings and legal pleadings can serve no useful purpose.

In short, the approval of Agreement No. 9899 cannot possibly harm the public interest; but it could help. The Commission should approve the Agreement 9899.

Respectfully submitted,



J. Scott Morrison

JSM:m

Nov. 6, 1970

APPENDIX, ITEM 7

FEDERAL MARITIME COMMISSION

ORDER

APPROVAL OF AGREEMENT NO. 9899
(AMERICAN EXPORT ISBRANDTSEN LINES, ET AL.)

The Commission has before it, pursuant to section 15 of the Shipping Act, 1916, an application for approval of an agreement providing for the exchange and cooperative development of certain types of information, between American Export Isbrandtsen Lines, Atlantic Container Lines, Ltd., Dart Containerline, Hapag-Lloyd, A.G., Seatrain Lines, Inc., Sea-Land Service, Inc., and United States Line, Inc. The signatories are all carriers of cargo in containers by containerships in the foreign commerce of the United States in one or more of the ocean trades from, to or between United States Atlantic ports on the one hand, and Atlantic ports of Continental Europe; Baltic and Scandinavian ports; Mediterranean ports; and ports of the United Kingdom and Eire on the other. The agreement has been designated Federal Maritime Commission No. 9899.

Agreement No. 9899 provides for the voluntary exchange of information among its signatories relating to:

1. Cost of service, rates, rules and tariffs relating to traffic in intermodal containers;
2. Practices in connection with the receipt and delivery of traffic in containers, including interchange with connecting land carriers or other transportation of intermodal containers between inland points and ports of loading or discharge from containerships; and

3. The regularity of traffic flow; the seasonal and other fluctuation of traffic flows, and related data bearing on the level and frequency required by shippers.

The purpose of exchanging this information is to develop whether uniform or agreed rules, practices and procedures are needed in the ocean trades covered by the agreement from the standpoint of container shippers or of the signatory carriers. Procedures to elicit the views of exporters and importers will be established.

Nothing in the agreement authorizes the parties to implement any program, understanding or arrangement based upon information resulting from the contemplated exchanges until such a plan is filed with, and approved by, the Commission and any other concerned Government agency.

Nothing in the agreement precludes any common carrier offering container service in the trades described from becoming a signatory and participating in discussions and exchanges of information.

Petitions commenting on the agreement have been received from the Department of Justice, Meyer Line and Finnline, which urge that the Commission hold a hearing on whether the agreement should be approved. Outboard Marine Corporation opposes approval with or without hearing.

The Commission having fully considered the terms of the proposed agreement, the petitioners' comments and the replies thereto, concludes that an evidentiary hearing is not required for the reasons set forth below.

No action in implementation of any arrangement reached in pursuance of this agreement may be taken without itself being submitted to and being approved by this Commission. Nothing more than permission to discuss and exchange data is herein sought; no action is contemplated.

The signatories' exchange and development of information is on a voluntary, not a mandatory, basis; any party may refrain from giving information and is free to continue or alter its present rates, rules or practices.

The agreement is one within the context of a regulated industry, not one subject to the uninhibited thrust of the antitrust laws as the Department of Justice's petition seems to imply. The Commission's proper concern is whether its approval will be violative of the criteria set out in section 15, Shipping Act, 1916. Section 15 is not restricted to, nor primarily concerned with a determination that an agreement, if approved, would impinge on the operation of free-market forces in an unregulated industry. All approvals under section 15 are granted in the full light of the Commission's continuing jurisdiction over and surveillance of the actual conduct of the parties under the agreement. While the preservation of competition is desirable as being in "the public interest" under section 15, such competition is to be preserved only after all counterbalancing regulatory purposes and transportation benefits to be derived from approval have been weighed. Consideration of the authorities, relied upon by the Department of Justice in its petition, shows them to be inapposite since they involved unregulated industries and dealt with action taken on the basis of exchanged information as well as the exchange itself.

In the light of the currently actue problems involving overtonnaging, instability and malpractices in the U.S. Atlantic/Continental Europe, Baltic, Scandinavian, United Kingdom, and Eire trade areas covered by the proposed Agreement No. 9899, it is apparent that the agreement seeks to solve serious transportation problems. However, the same lack of order does not appear to presently exist in the trades to and from Mediterranean ports. The Commission, therefore, does not now see the need for exchange of information and discussions covering such trades, and is accordingly granting approval to Agreement 9899 on the condition that no information exchange or discussion relate to operations in respect to Mediterranean ports.

To consider Agreement No. 9899 as a part of the proceeding in Docket No. 69-58, Agreement 9813 - Conference Agreement Transatlantic Freight Conference, or to establish a special proceeding with an attendant evidentiary hearing, as requested by certain petitioners, would delay for an unwarranted time action upon an agreement aimed at seeking solutions as rapidly as possible to immediate concerns.

The Commission is not unaware that even the exchange of information alone, may involve some risk of further anticompetitive conduct incompatible with the criteria and requirements of section 15. Consequently, the Commission has imposed strict reporting and time strictures which will minimize this risk.

NOW THEREFORE, IT IS ORDERED, That whereas our examination of the agreement, protests and replies thereto indicates that the proposed agreement would not be unjustly discriminatory or unfair as between carriers, shippers,

exporters, importers or ports, or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or contrary to the public interest, or violative of the Shipping Act, 1916, said agreement is hereby approved pursuant to section 15 of the Shipping Act, 1916.

IT IS FURTHER ORDERED, That the approval granted herein is to be effective for a period of three months from the date of this approval with the right to seek renewal for an additional consecutive three month period upon the termination of the period of initial approval, provided that an application seeking renewal is filed with the Commission by the signatories not later than one (1) month prior to the expiration of the initial term.

IT IS FURTHER ORDERED, That each and every exchange, discussion or agreement transacted under the terms of this agreement shall be reported in writing to the Commission within ten (10) days of such occurrence. Such report will be rendered in a form adequate to fully inform the Commission of the topics discussed or information exchanged and the time such discussion and exchange took place.

AND IT IS FURTHER ORDERED, That this approval applies only to exchange of information and discussions relating to the trades between U.S. Atlantic Ports and Continental Europe, Baltic ports, Scandinavian ports, and ports

of the United Kingdom and Eire. No information exchange or discussion shall relate to the U.S. Atlantic/Mediterranean Trades.

By the Commission, November 24, 1970

(Sgd.) Francis C. Hurney

(SEAL)

Francis C. Hurney
Secretary

APPENDIX, ITEM 8

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

AGREEMENT NO. 9899, AMERICAN
EXPORT ISBRANDTSEN LINES, ET AL.

DOCKET NO.

MOTION OF THE DEPARTMENT OF JUSTICE FOR
IMMEDIATE STAY OF COMMISSION ORDER OF
NOVEMBER 24, 1970, PENDING COMMISSION
RULING ON THE DEPARTMENT'S ATTACHED
PETITION FOR STAY AND FOR ORDER SHORTEN-
ING THE TIME FOR REPLY TO THE DEPARTMENT'S
PETITION TO FIVE DAYS

Pursuant to Rules 5(i), 5(m) and 16(c) of the Commission's Rules of Practice and Procedure, the Department of Justice respectfully moves that the Commission immediately stay the effective date of its Order of November 24, 1970 until the Commission rules on the attached Petition of the Department of Justice. An immediate stay, issued this date if possible, is necessary to prevent the kind of irreparable alteration of the status quo referred to in the attached Petition.

Also, pursuant to Rule 7(c) of the Commission's

Rules of Practice and Procedure, in order to expedite the consideration of all views, the Department of Justice respectfully moves that the time for reply to the attached Petition be reduced to five days.

Respectfully submitted,

RICHARD W. McLAREN
Assistant Attorney General



ROBERT T. STERN
Attorney, Department of Justice

JOSEPH J. SAUNDERS
Attorney, Department of Justice

Dated: December 1, 1970

APPENDIX, ITEM 9

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

AGREEMENT NO. 9899, AMERICAN
EXPORT ISBRANDTSEN LINES, ET AL.

DOCKET NO.

PETITION OF DEPARTMENT OF JUSTICE
FOR STAY OF COMMISSION ORDER

Pursuant to Rules 5(i), 5(m) and 16(c) of the Commission's Rules of Practice and Procedure, the Department of Justice hereby petitions the Commission for an Order staying until December 21, 1970, the effective date of its Order, dated November 24, 1970, approving Agreement 9899 without hearing.

This Agreement, providing for the exchange and cooperative development of certain types of information among seven container shipping lines on the North Atlantic was submitted to the Commission on September 21, 1970. Pursuant to official notice of the above-entitled Agreement by the Commission on September 25, 1970, the Department of Justice submitted a timely Petition, dated

October 15, 1970, offering comments and requesting a hearing. By Order of November 24, 1970, the Commission approved the Agreement, without hearing, to be effective from the date of approval.

In support of its petition of stay of the effective date of said Order, the Department of Justice shows as follows:

1. The Department of Justice maintains its position that Agreement 9899 may operate to the detriment of the commerce of the United States, or be contrary to the public interest, and therefore be unapprovable under Section 15 of the Shipping Act, and that a hearing is required to determine (1) whether the Agreement will have anticompetitive effects, and if so, how substantial such effects will be; (2) whether the Agreement is necessary to provide specific public benefits which outweigh the anticompetitive effects; and (3) whether the Agreement invades antitrust policy any more than absolutely necessary to permit achievement of the specific transportation benefits sought to be obtained.

2. Approval of Agreement 9899 without hearing in the face of the Department's raising of substantial questions under Section 15 and its request for hearing appears to be contrary to the requirements imposed on the Commission in connection with its consideration of

Section 15 agreements. Marine Space Enclosures, Inc.
v. FMC, 420 F2d 577 (1969).

3. Because of the important public policy questions presented by the Commission's approval of this Agreement without a hearing, the Department of Justice must consider whether it should undertake action to secure further review of the Commission's Order. A reasonable amount of time is required for the Department's study of the issues presented.

4. The interests of justice require that the Commission stay its order so as to avoid irreparable alterations of the status quo. Under the Commission's November 24, 1970 order, the nine carriers are now free to exchange and cooperatively develop the most sensitive kinds of individual-company, financial and cost data. 1/ Such exchanges of information may have repercussions upon the subsequent competitive conduct of the parties even though the November 24, 1970 Commission Order is later reversed or modified. Thus, the activity authorized by the Commission's November 24, 1970 Order may

1/ The very same data relating to costs which the carriers propose to exchange under the instant agreement has been characterized by them as highly confidential. In Docket No. 69-58 (Transatlantic Freight Conference) they have resisted disclosing the data on the ground that release would prejudice their competitive positions.

jeopardize the Department's right to a final, proper, disposition of the Agreement under the standards of Section 15 of the Shipping Act. Until such final disposition of the Agreement, which may result in disapproval, the participating shipping lines are authorized to conduct activities which may ultimately be held to be contrary to the standards of Section 15 of the Shipping Act and, were it not for the immunity, a violation of the antitrust laws.


In view of the fact that the Commission has limited the effectiveness of the Agreement to an initial period of only three months, it can be anticipated that the parties are presently preparing to carry out the Agreement at the soonest possible date. . Therefore it is imperative promptly to stay the effective approval in order to prevent any or all of the irreversible activities referred to above.

WHEREFORE, the Department of Justice respectfully requests the Commission to stay until December 21, 1970, the effective date of its Order of November 24, 1970.

Respectfully submitted,

RICHARD W. McLAREN
Assistant Attorney General

JOSEPH J. SAUNDERS
Attorney, Department of Justice


ROBERT T. STERN
Attorney
Department of Justice

Dated: December 1, 1970.

APPENDIX, ITEM 10

(S E R V E D)
(December 4, 1970)
(FEDERAL MARITIME COMMISSION)

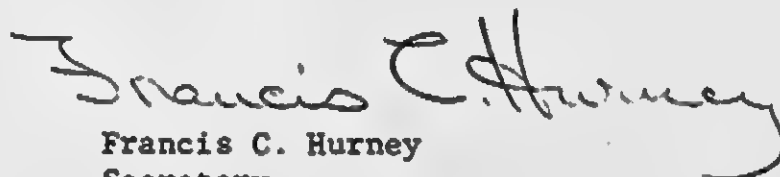
FEDERAL MARITIME COMMISSION

DENIAL OF RECONSIDERATION OF
ORDER APPROVING AGREEMENT NO. 9899

The Department of Justice has petitioned for a stay of the Commission's order approving Agreement 9899, a cooperative working arrangement between certain container lines in the trade between U.S. Atlantic ports and European and Mediterranean ports. Justice, an original protestant against approval of the agreement, makes again the arguments the Commission found insufficient in the order of approval. Now Justice urges that a stay of the order is necessary to prevent irreparable alterations of the status quo while Justice, "Because of the important public policy questions presented by the Commission's approval without a hearing . . . consider[s] whether it should undertake action to secure further review of the Commission's Order."

We find this insufficient cause for staying our approval of Agreement 9899, and Justice offers no other. Accordingly, the petition is denied.

By the Commission.


Francis C. Hurney
Secretary

APPENDIX, ITEM 11

BEFORE THE

FEDERAL MARITIME COMMISSION

. x

In the Matter of :

AGREEMENT 9899 :

. x

PETITION OF
MEYER LINE AND FINNLINES
FOR RECONSIDERATION AND STAY

Meyer Line and Finnlines, pursuant to Rule 16(a) of the Rules of Practice and Procedure, hereby respectfully petition the Commission to reconsider its Order dated November 24, 1970, mailed on November 25, 1970, approving Agreement No. 9899, and further request the Commission to stay the effective date of the Order until hearing and determination of the petition for reconsideration.

For the Commission to approve, without even the semblance of a hearing, an agreement among the dominant carriers in one of the most significant areas of the ocean commerce of the United States flies directly in the face of the statutory guarantee of a hearing, pursuant to Section 15 of the Shipping Act of 1916. The Commission's Order completely ignores the standards laid down by the Court of Appeals in Marine Space Enclosures, Inc. v. Federal Maritime Commission, 420 F. 2d 577 (D.C. Cir. 1969):

"It would be a travesty to suppose that Congress meticulously required an appropriate hearing and reasoned disposition as a condition of disapproval of industry agreements but was prepared to acquiesce in agency approval [without] * * * opportunity for appropriate presentation of objection, evidence and argument. What the words of § 15 fairly indicate is that an appropriate hearing shall be held prior to either approval or disapproval." (id. at 583-4)

As to asserted problems of delay, we must respectfully recall to the Commission that Meyer Line and Finnliness have simply requested that the approvability of this Agreement be added as an issue in the presently pending proceeding in Docket 69-58 involving the proposed Superconference Agreement No. 9813; the close relationship of the two matters is self-evident, since the two agreements are between exactly the same parties and cover the same trade area. Assertions as to allegedly crucial time problems must in the circumstances be regarded as open to very great question. We mention, by way of illustration, the following: (1) the Agreement, although dated September 4th, was not filed with the Commission until September 21st; (2) the Commission, although publishing the Agreement in the Federal Register on only ten days' notice, and the protest of Meyer Line and Finnliness having been served on October 1st, the Commission thereafter deferred action and did not enter its Order until November 24th; (3) in the related case of the Superconference Agreement 9813, Docket No. 69-58, where the same parties have

been making similar assertions as to urgency and time problems, they have most recently caused a hiatus in the proceeding from November 13th to December 21st by reason of the unilateral refusal of their own principal witness to appear at scheduled hearings (Docket No. 69-58, Tr. 929-934). In the circumstances, unsupported assertions as to time problems of the parties to Agreement 9899 cannot justify the denial of a hearing.

Meyer Line and Finnnlines further respectfully request that the Commission stay the effective date of its Order until hearing and determination of the proceedings upon this petition for reconsideration. Unless a stay is ordered, the parties will have carried out Agreement 9899, and any decision by the Commission on reconsideration will be moot.

Dated: December 2, 1970

Respectfully submitted,

Sanford C. Miller

Sanford C. Miller, Attorney for
Meyer Line and Finnnlines

FORM #GEN. 6

APPENDIX, ITEM 12
TELEGRAM

12/3/70

Time Wire Service ☐
Straight Telegram ☐
Day Letter ☐
Night Message ☐
Night Letter ☐
Via—Western Union—Postal ☐

FROM



Johnson Motors
WAUKEGAN, ILLINOIS 60085

Date _____

Time _____ A.M. _____ P.M.

Paid ☐ \$ _____

Sent Collect ☐ \$ _____

FILE COPY (Yellow)

CHECKING COPY (White)

CONFIRMATION COPY (Pink)

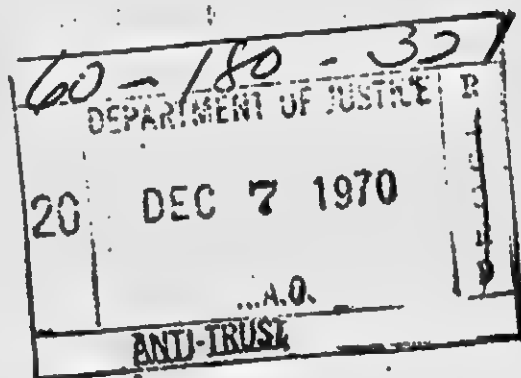
TO:

FEDERAL MARITIME COMMISSION
1405 I STREET, N.W.
WASHINGTON, D.C. 20573

PETITION FOR STAY OF COMMISSION ORDER REQUESTED AGREEMENT NO. 9899.
WE ADOPT IN PRINCIPLE DEPARTMENT OF JUSTICE POSITION MOTION FOR
IMMEDIATE STAY OF ORDER NOVEMBER 24, 1970.

J.A. ILLES
OUTBOARD MARINE CORPORATION
WAUKEGAN, ILLINOIS

CC: FILED WITH KNOWN PARTIES OF RECORD
ROBERT T. STERN - DEPT. OF JUSTICE



APPENDIX, ITEM 13

Before the
FEDERAL MARITIME COMMISSION

AGREEMENT NO. 9899, AMERICAN)
EXPORT ISBRANDTSEN LINES, ET AL.)

Docket No.

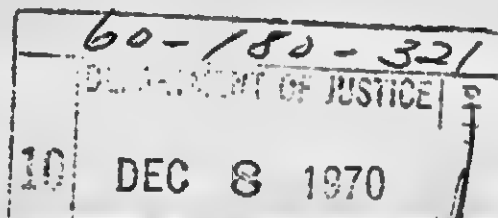
REPLY TO PETITION OF DEPARTMENT
OF JUSTICE AND
STATEMENT OF POSITION

It seems clear to American Export Isbrandtsen Lines, Inc.
[AEIL], a signatory to Agreement No. 9899, that the Department of
Justice has not advanced any reason for the stay of the Commission's
Order. The Petition of the Department is filled with generalities -

[i.e., " . . . Agreement 9899 may operate
to the detriment of the commerce of the
United States, or be contrary to the public
interest . . ." etc. (page 2); "The interests
of justice require that the Commission stay
its order so as to avoid irreparable altera-
tions of the status quo." (page 3)] -

and it does not address itself to any factual allegations of a type that
would sustain such equitable relief.

In view of the controversy that this agreement has provoked,
AEIL desires to set forth its position in the matter. AEIL agreed to
enter into discussions with the other signatories to Agreement 9899 for
the purpose of exploring whether some way could be found to discontinue



the rate war and to rationalize the unsettling conditions that were and are eroding the North Atlantic trade. It was and is AEIL's position that merely entering into such discussions with other carriers does not constitute an agreement within the purview of section 15. Nevertheless, despite its opinion that Agreement 9899 did not have to be filed with or approved by the Commission, AEIL did enter into the agreement because some parties considered it necessary, and AEIL did not desire to impede in any way these salutary discussions.

The situation has now developed into what AEIL believes may be a hideous and most unfortunate precedent. A requirement that parties to the Act obtain the Commission's approval prior to undertaking preliminary discussions concerning a possible section 15 agreement is unprecedented under section 15. Similarly, a requirement that the parties report in writing -

"each and every exchange, discussion . . .
transacted . . . within ten (10) days of such
occurrence . . ."

may well prevent rather than assist parties from reaching a modus vivendi or accord that would stop the instability in the North Atlantic trade.

As far as we are concerned, if the Commission's order in this proceeding stands as it is [without further explanation], it could overturn over 50 years of consistent administrative interpretation under section 15 of the Act. We know of no prior administrative or judicial decision that

would require parties to the Shipping Act to obtain Commission approval before entering into discussions concerning "rates, rules and tariffs" or other types of section 15 agreements so long as no actual anticompetitive agreement is implemented. Similarly, there has been no requirement that parties entering into such preliminary discussions file periodic reports and "records, files and memoranda" with the Commission of the status of each preliminary discussion. These are requirements under a materially different situation under the Interstate Commerce Act [see section 5a (Reed-Bulwinkle Act), 49 U.S.C. § 5b], and they have not been incorporated or enacted in the Shipping Act.

The Commission has consistently held that such agreements need not be filed for approval under section 15. For example, an "agreement to agree" need not be submitted for approval, Transshipment Agreement Between S. Thailand And U. S., 10 F.M.C. 201, 215 (1966). Similarly a preliminary arrangement to exchange information and discuss matters - "a mere preliminary step which may lead to a section 15 agreement but which, in and of itself does not constitute such an agreement" - need not be filed, Transshipment Agreement, Indonesia/United States, 10 F.M.C. 183, 196 (1966). As the Commission has explained,

"The short answer is that a mere agreement to negotiate . . . cannot, standing alone, accomplish those things covered by section 15 and therefore an 'agreement' does not come within the section." Transshipment Agreement Between S. Thailand And U. S., supra at p. 215.

See also Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., 77, 82 (1965). An agreement that does not affect competition is not subject to section 15. Crown Steel Sales, Inc. v. Port of Chicago Marine Terminal Assn., 12 F.M.C. 353, 377 (1967).

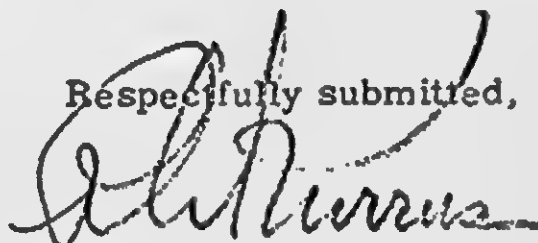
There is no reason for the Commission to abandon these long-standing and well accepted precedents in this matter. It is no answer for the Commission to say, as it has in its Order in this agreement, that -

"The Commission is not unaware that even the exchange of information alone, may involve some risk of further anticompetitive conduct incompatible with the requirements of section 15." (Order, p. 4)

The fact is that the parties do not intend that this agreement should have any anticompetitive effect. It is difficult to see what immunity the Commission has by its order given or exactly what it has accomplished.

AEIL is apprehensive that any formal petition for reconsideration in the matter may delay or prevent discussions which we believe must take place if further irreparable injury and instability in this trade is to be avoided. Therefore, at the moment, AEIL is merely setting forth its position.

Respectfully submitted,



RICHARD W. KURRUS
KURRUS and JACOBI
2000 K Street, N. W.
Washington, D. C. 20006

December 7, 1970

Attorneys for American Export
Isbrandtsen Lines, Inc.

APPENDIX, ITEM 14

(S E R V E D.)
(DECEMBER 31, 1970)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

SUPPLEMENTAL ORDER

REQUIRING SUBMISSION OF INFORMATION
RELATIVE TO APPROVAL OF AGREEMENT NO. 9899
(AMERICAN EXPORT ISBRANDTSEN LINES, ET AL.)

On November 24, 1970, the Commission pursuant to section 15 of the Shipping Act, 1916, approved an agreement providing for the exchange of certain types of information between American Export Isbrandtsen Lines, Atlantic Container Lines, Ltd., Dart Containerline, Hapag-Lloyd, A.G., Seatrain Lines, Inc., Sea-Land, Service, Inc., and United States Lines, Inc.

The approval of the agreement was, among other things, conditioned upon the following language:

IT IS FURTHER ORDERED, That each and every exchange, discussion or agreement transacted under the terms of this agreement shall be reported in writing to the Commission within ten (10) days of such occurrence. Such report will be rendered in a form adequate to fully inform the Commission of the topics discussed or information exchanged and the time such discussion and exchange took place.

On December 11, 1970, the Department of Justice filed with the United States Court of Appeals for the District of Columbia^{1/} an application for a temporary stay and a motion for stay pending review of our


^{1/} United States of America v. Federal Maritime Commission
and United States of America, Docket No. 24,895.

order of approval of Agreement 9899. On December 30, 1970, the Court, per curiam, denied the Department's motion and application conditioned upon a Commission order that the parties to the agreement supply the Commission all information exchanged pursuant to Agreement 9899.

Accordingly, the order of approval dated November 24, 1970, is hereby amended by substitution of the following language in lieu of that set forth above:

IT IS FURTHER ORDERED, That each and every exchange, discussion or agreement transacted under the terms of this agreement shall be reported in writing to the Commission within ten (10) days of such occurrence. Such report will be rendered in a form adequate to fully inform the Commission of the topics discussed and shall contain ten (10) copies of all information exchanged as well as the time such discussion and exchange took place. All information exchanged to date pursuant to the terms of this agreement shall be forwarded to the Commission within five (5) days of service of this Supplemental Order.

By the Commission.


Francis C. Hurney
Secretary

(SEAL)

APPENDIX, ITEM 15

FEDERAL MARITIME COMMISSION

(S E R V E D)
(JANUARY 13, 1971)
(FEDERAL MARITIME COMMISSION)

DENIAL OF PETITION FOR RECONSIDERATION
OF ORDER APPROVING AGREEMENT NO. 9899

On December 9, 1970, Meyer Line and Finnlines petitioned for reconsideration and stay of the Commission's order of approval of Agreement 9899 dated November 24, 1970.

The Agreement, providing for the exchange of certain types of information between certain container lines in the trade between U. S. Atlantic ports and European and Mediterranean ports, was recently the subject of an application for a temporary stay and a motion for stay pending review of the order before the United States Court of Appeals for the District of Columbia (United States of America v. Federal Maritime Commission and United States of America, Docket No. 24,895). On December 30, 1970, the Court denied the application and motion, conditioned upon a Commission order that the parties to the Agreement supply the Commission all information exchanged pursuant to the Agreement. On December 31, 1970, the Commission issued a Supplemental Order requiring, among other things, that copies of all information exchanged be reported to the Commission.

The petition herein was filed two days prior to institution of the Court proceeding. Although petitioners did not intervene before the Court, the arguments advanced in their petition were already considered at the time of approval by us and were, essentially, advanced before the Court. Accordingly, the petition is denied.

By the Commission.

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JAN 15 1971 (SEAL)

Francis C. Hurney
Secretary

APPENDIX, ITEM 16

BEFORE THE
FEDERAL MARITIME COMMISSION

In the Matter of
Agreement 9899
(American Export Isbrandtsen Lines, et al.)

REQUEST TO RENEW AGREEMENT
FOR AN ADDITIONAL THREE MONTHS

The parties to Agreement 9899 request this Commission to renew Agreement 9899 for an additional consecutive three month period. For purposes of this request, the parties state:

1. Agreement 9899 between United States and foreign flag carriers of cargo in containers in the foreign commerce of the United States in the North Atlantic trades, was filed with the Federal Maritime Commission (Commission) on September 21, 1970, and approved by the Commission on November 24, 1970. Approval was to be effective for a period of three months with the right to seek renewal for an additional consecutive three month period upon the termination of the initial period. An application for renewal was to be filed not later than one month prior to the termination of the initial period. By virtue of this approval, Agreement 9899 would terminate on February 23, 1971.

60-180-321

11	DEPARTMENT OF COMMERCE JAN 29 1971 P.M.O. FBI-NEW YORK
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2. On December 1, 1970, the Department of Justice (Department) petitioned for a stay of the Commission's order of approval. The Commission denied this petition on December 4, 1970. The Department then applied to the United States Court of Appeals for the District of Columbia Circuit for a temporary stay of the Commission's order of approval pending final disposition of the Department's motion for stay together with a motion for stay pending review. On December 11, the Court (Per Curiam) ordered the Commission to file a response by December 16 and held the Department's petition in abeyance pending that response. Responses were filed and oral arguments presented by the Commission and carriers party to Agreement 9899. On December 30, 1970, the Court denied the Department's motion and application upon condition that the Commission "order the parties to the Agreement to supply to the Commission all information exchanged pursuant to Agreement 9899." On December 31, 1970, the Commission issued its supplemental order amending the order of approval to require the parties to Agreement 9899 to submit information in compliance with the order of the Court of Appeals.

3. Although the status of Agreement 9899 was in doubt until the Court's Order of December 30, and despite the many legal motions and applications, Agreement 9899 was never suspended, nor was the Commission's order of approval stayed. The time for the termination of the temporary approval granted by the Commission and for requesting a further extension of the Agreement has continued to run.

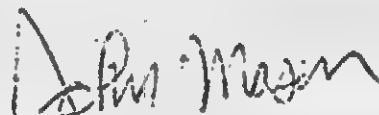
4. The appellate procedure, including proceedings, replies, motions and oral argument, which consumed the month of December, together with the necessity of utilizing to the fullest the short period of initial approval, distracted the attention of the parties from the precise date for filing for a further extension one month before the termination of the initial approval. The application should have been filed on January 25, rather than its present date of January 28. The parties submit that this brief delay is de minimis, does not prejudice any person, does not affect the present termination date or the additional time requested, and does not constitute a reason for refusal to extend Agreement 9899 for an additional three month period.

5. The transportation needs justifying Commission approval of Agreement 9899 continue to exist. There are still acute problems involving over-tonnaging, instability and malpractice in the North Atlantic trades. Despite the uncertainties caused by the appeals of the Commission's order, member carriers have already taken initial steps to solve these problems. Meetings were held on December 4, by the representatives of U.S. flag carriers and December 16 and January 19 by the representatives of U.S. flag and foreign flag carriers. Minutes of meetings are furnished the Federal Maritime Commission. The Commission has also been furnished with the draft of a proposed agreement submitted by U.S. flag carriers and statistical data exchanged by the carriers. Foreign flag lines are in the process of drafting their own proposed agreement,

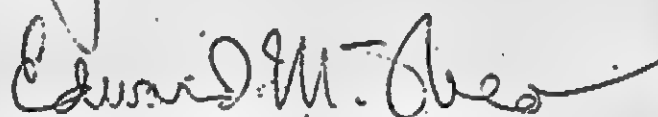
which will be furnished the Commission. Consistent with the terms of Agreement 9899, the parties thereto are searching for solutions to the problems in the North Atlantic trades. Further discussions are required so that solutions may be obtained. A three month extension of the Agreement is necessary to continue these discussions. Any actions to be taken by parties to the Agreement as a result of these discussions will be submitted to the Commission pursuant to the appropriate provisions of the Shipping Act.

For the foregoing reasons the parties to Agreement 9899 request that the Agreement be renewed for an additional consecutive three month period from February 23, 1971.

Respectfully submitted,



John Mason



Edward M. Shea

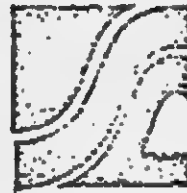


Paul J. McElligott

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Request To Renew Agreement For An Additional Three Months was served on all those who commented on Agreement 9899; Mr. Sanford C. Miller, Attorney for Meyer Line and Finnlines and the Department of Justice this 28th day of January, 1971.



SEA-LAND
SERVICE, INC.

September 17, 1970

Francis C. Hurney, Secretary
Federal Maritime Commission
1405 Eye Street, N. W.
Washington, D. C. 20573

Dear Sir:

On behalf of the seven containership operators listed below, we submit an Agreement for approval pursuant to Section 15 of the Shipping Act of 1916. Three separate signed counterparts containing the signatures of the four American-flag operators are enclosed, and we expect the three European container carriers also listed below to subscribe to this Agreement. We expect very shortly to substitute for the attached counterparts an Agreement fully signed by all of these carriers.

There is an urgent necessity to bring order and stability into the trade covered by this Agreement, and the objective is to provide a forum through which the carriers can proceed in an orderly fashion toward an ultimate Agreement.

The urgent necessity is caused by the explosive growth of container operations in the North Atlantic over the past two years. It is well known to the Commission that container operations have brought not only new service concepts to the shippers trading between Europe and America but have also introduced new problems.

One source of new problems is the fact that in container operations a valuable unit of the ocean carrier, the container itself, leaves the possession of the ocean carrier and goes into the possession of the shippers, consignees, or connecting carriers. It may fairly be said that the policies and practices

Francis C. Hurney
Page Two
September 17, 1970

of each container operator have developed according to each of the operator's own concepts and needs and that this, in turn, has resulted in inconsistencies as between the practices of the carriers.

The premises of the attached Agreement are that cooperation between the carriers in developing uniform standards and practices is the quickest way to reach the stability that is essential both to the shipping public and to the container carriers; and the quickest possible action is necessary to curb further deterioration and confusion.

Respectfully submitted,
SEA-LAND SERVICE, INC.

J. Scott Morrison
Vice-President, Traffic

JSM:mk

att. Ref. Agreement

cc: American Export Isbrandtsen Lines, Inc.
Atlantic Container Line, Ltd.
Dart Containerline Incorporated
Hapag-Lloyd Atkiengesellschaft
Seatrains Lines, Inc.
United States Lines, Inc.

APPENDIX, ITEM 18
BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

AGREEMENT NO. 9899, AMERICAN
EXPORT ISBRANDTSEN LINES, ET AL. }

} DOCKET No.

PETITION OF THE DEPARTMENT OF JUSTICE

Comes now the petitioner, the Department of Justice, by its attorneys, and pursuant to the Commission's Order, dated February 2, 1971, setting forth notice of an application that the Commission's authorization of Agreement 9899 be renewed for an additional consecutive three month period from February 23, 1971, respectfully states that it has an interest in the matter and submits that the Commission should not grant the requested renewal without holding the hearing required by section 15 of the Shipping Act.

Prior to the Commission's initial approval of Agreement 9899, the Department pointed out that the Agreement raised substantial questions of possible anticompetitive effect which could only be resolved by a hearing. In light of the facts that (1) there has been no change in

Agreement 9899 since the original Commission Order of approval, November 24, 1970 and (2) the proponent lines still have failed to make any showing why any specific information exchange or co-operative development of information is necessary to reach agreement on a proposed solution of the alleged problems of over-tonnaging, instability and malpractices in the North Atlantic trades; the Department hereby incorporates by reference the arguments made and authorities cited in its Petition of October 15, 1970 and in its Petition for Stay of Commission Order of December 1, 1970.

The fact that Agreement 9899 has been in effect for nearly 3 months only accentuates the inadequacy of the showing which the applicants have made for its extension. Now that the signatories have met and discussed their problems in detail, pursuant to the Commission's November 24, 1970 authorization, it should have been possible for them more specifically to inform the Commission what categories of information of a competitively sensitive nature they propose to exchange and why such exchanges are necessary in order to accomplish the purposes of Agreement 9899. Yet the justification advanced for extending the authorization to exchange information is, if anything, vaguer and less informative than the justification advanced for approving Agreement 9899 itself.

Moreover, we submit that the Commission should now take official notice of the affidavits filed in the United States Court of Appeals for the District of Columbia Circuit by American Export Isbrandtsen Lines. */ The affidavit of Mr. Kurrus, subsequently subscribed to by AEIL Chief Executive Officer Mr. Diaz, states that as of December 17, 1970 no confidential information within the three categories set forth in the Commission's order had been exchanged and that it was not contemplated that any such information would be exchanged. Notwithstanding this, the affidavits report that "the signatories to Agreement 9899 are very close to reaching an accord on a pooling agreement." (Kurrus affidavit, paragraph 8) These representations obviously cast doubt upon the implicit premise in the Commission's November 24, 1970, order that an authorization for exchanges of competitively sensitive information was necessary in order for the signatories to Agreement 9899 effectively to carry on their discussions and negotiations over the conditions in the North Atlantic containership trade.

*/ Affidavits of Richard W. Kurrus and Manuel Diaz, attached to American Export Isbrandtsen Lines, Inc. Opposition to Application for Temporary Stay, United States v. Federal Maritime Commission, CADC No. 24895.

CONCLUSION

For the foregoing reasons, the Department of Justice respectfully submits that the "Request To Renew Agreement for an Additional Three Months" should be set down for hearing.

Dated: February 12, 1971

Robert T. Stern

ROBERT T. STERN
Attorney, Department
of Justice

JOSEPH J. SAUNDERS

MILTON J. GROSSMAN
Attorneys, Department
of Justice

APPENDIX, ITEM 19
FEDERAL MARITIME COMMISSION

ORDER

APPROVAL OF AGREEMENT NO. 9899-1
(Application to extend basic agreement)

Pursuant to section 15 of the Shipping Act, 1916, an agreement between American Export Isbrandtsen Lines, Inc., Atlantic Container Line, Ltd., Dart Containerline, Inc., Hapag-Lloyd A.G., Seatrain Lines, Inc., Sea-Land Service, Inc., and United States Lines, Inc., has been filed with the Commission for approval and assigned Federal Maritime Commission Number 9899-1.

Agreement No. 9899-1 is an application to extend approval of the basic agreement for an additional consecutive three month period.

The basic agreement, Agreement No. 9899, provides for the voluntary exchange of information between the parties for the purpose of determining whether uniform or agreed rules, practices, and procedures are needed in the ocean trades covered by the agreement from the standpoint of container shippers or of the signatory carriers.

It was approved on November 24, 1970 without a hearing over the protests of the Department of Justice, Meyer Line, Finnlines, and the Outboard Marine Corporation on the grounds that it was designed to help solve serious transportation problems (overtonnaging and rate wars) in the involved trades, that it would be under constant surveillance by the Commission, that exchanges were voluntary, that each party was free to act independently on all matters, and any further agreements reached would have to be filed with and approved by the Commission before implementation.

In response to notice of the application for extension filed in the Federal Register on February 2, 1971, Justice requests the extension be set down for hearing prior to approval for the reasons set forth in its original petition and for the further reasons that (1) there has been no change in Agreement No. 9899 since the original approval and (2) the proponent lines still have not shown why any specific information exchange or cooperative development of information is necessary to reach agreement on a proposed solution of the alleged problems of over-tonnaging, instability, and malpractices in the North Atlantic trades. None of the other protestants have filed in connection with the application to extend.

After having fully considered conditions as they now stand in the trade, the effects thus far of Agreement No. 9899, Justice's comments and replies thereto, the Commission concludes that an evidentiary hearing is not required on the application to extend approval of Agreement No. 9899 for the reasons set forth in the initial order of approval dated November 24, 1970 and for the further reasons that (1) Justice has advanced no new matter which would require a hearing on the application to extend, (2) the conditions which warranted initial approval of Agreement No. 9899 still exist, (3) the parties have exchanged information in an attempt to reach solutions to the problems in the North Atlantic trades, (4) they have filed reports with the Commission explaining in detail each exchange of information and discussion pursuant to the instructions of the D. C. Court of Appeals, (5) they have proposed and are considering a pooling agreement

as a possible solution to the existing transportation problems, and
(6) further discussions and exchanges appear to be necessary to bring to fruition the intent of the agreement and the Commission's reasons for initially approving it.

NOW THEREFORE, IT IS ORDERED, that whereas our examination of the basic agreement, the application to extend, protests and replies thereto indicates that the proposed application to extend would not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or contrary to the public interest, or violative of the Shipping Act, 1916, Agreement No. 9899-1 is hereby approved pursuant to section 15 of the Shipping Act, 1916.

IT IS FURTHER ORDERED, that the approval granted herein is to be effective for a period of three months from the date of this approval with the right to seek renewal for an additional consecutive three month period upon the termination of the period herein approved, provided that an application seeking renewal is filed with the Commission by the signatories not later than one (1) month prior to the expiration of the approved term.

IT IS FURTHER ORDERED, that each and every exchange, discussion or agreement transacted under the terms of this agreement shall be reported in writing to the Commission within ten (10) days of such occurrence. Such report will be rendered in a form adequate to fully inform the Commission of the topics discussed and shall contain ten (10) copies of all information exchanged as well as the time such discussion and exchange took place.

AND IT IS FURTHER ORDERED, that this approval applies only to exchange of information and discussions relating to the trades between U. S. Atlantic ports and Continental Europe, Baltic ports, Scandinavian ports, and ports of the United Kingdom and Eire. No information exchange or discussion shall relate to the U. S. Atlantic/Mediterranean trades.

By the Commission February 24, 1971

(Sgd.) Francis C. Hurney
Secretary

S E A L

APPENDIX, ITEM 20

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February 24, 1971

HAND DELIVERY

Mr. Francis C. Hurney
Secretary
Federal Maritime Commission
1405 Eye Street, N. W.
Washington, D. C.

Dear Secretary Hurney:

Re: Agreement 9899-1

On January 28, 1971, the parties to Agreement 9899 requested that the Agreement be extended for another three months from February 24, 1971. The request for extension was designated Agreement 9899-1 and noticed in the Federal Register on February 2, 1971. The notice required any party desiring a hearing to provide "clear and concise statements of the matters upon which they desire to introduce evidence" and to describe with particularity any alleged unfairness, discrimination, violations of the Shipping Act, or detriments to commerce". On February 12, the Department of Justice requested a hearing on the extension of Agreement 9899 for three months. This request did not provide any clear and concise statement of specific matters on which Justice wished to adduce evidence and did not describe any unfairness, discrimination, violation of the Act, or detriment to commerce which would result from the three-month extension. The petition advanced no new matter requiring a hearing, and offered no argument not already rejected by the Commission in approving Agreement 9899 without a hearing or by the United States Court

of Appeals for the District of Columbia Circuit in denying the Justice Department's appeal of that decision.

The Department's petition ignored statements in the request for extension that compelling reasons exist for granting the request, and that documents had indeed been exchanged between the parties to the Agreement, which were filed with the Commission in accordance with the order of the Court of Appeals and the Commission's Order of December 31, 1970. Further, the request for extension stated that additional documents to be exchanged between the parties are in preparation. The minutes of a January 19 meeting between representatives of American and European lines, filed with the Commission, reveal that a draft agreement, being prepared by European lines, would be ready for submission in the latter part of February. That draft agreement and one prepared by American Lines (as noted in the request for extension) are intended for discussion between the parties in the hopes of reaching some solution to the many problems presently besetting the North Atlantic trade. The Commission is well aware of the transportation needs for extending the Agreement.

The Justice allegations of anticompetitive effects and demand for a public hearing are inconsistent with the Department's position in other like cases. Justice authorized American oil companies to talk with foreign oil companies and foreign countries to reach agreement on international oil problems. Not only was the Justice Department authorization given without any public hearing, the Department even refuses to make public its written authorization to the oil companies. Surely, the settling of international transportation problems should not be relegated to secondary status, and jeopardized by unnecessary delay.

Although the time for replying to the Justice Department petition has not expired, parties to Agreement 9899 request immediate consideration and approval of a three-month extension of the Agreement so that preparation and

Mr. Francis C. Hurney

- -

February 24, 1971

consideration of proposed agreements and the pursuit of proposed solutions may continue. Any final agreement of the parties would be filed with the Commission at which time interested parties may comment.

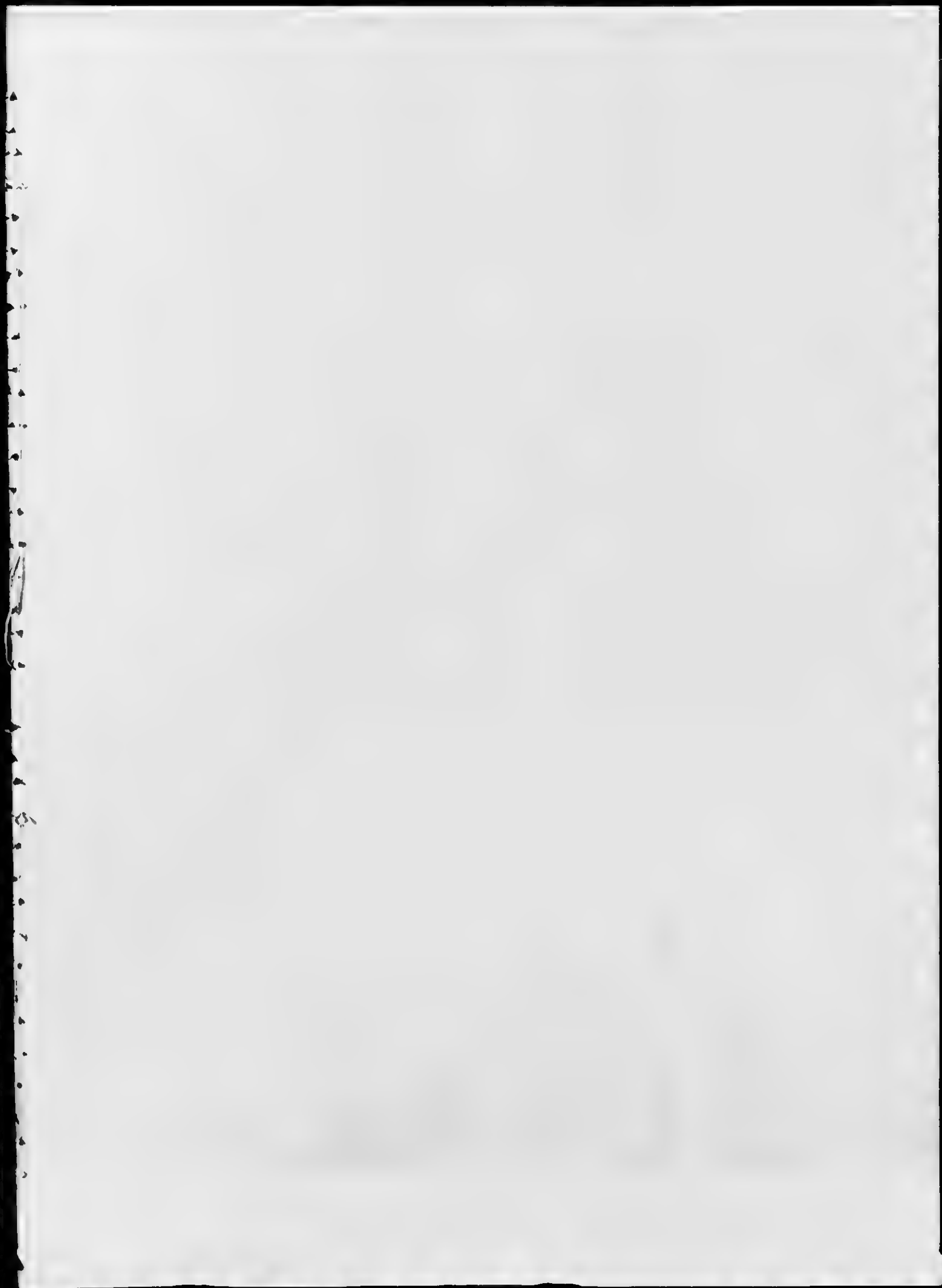
Respectfully submitted,



J. Scott Morrison

SEA-LAND SERVICE, INC.

cc: Robert Stern, Department of Justice
Hand Delivered



Docket No. 24895

IN THE
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

United States of America,

Petitioner,

v.

Federal Maritime Commission and
United States of America,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
THE FEDERAL MARITIME COMMISSION

BRIEF FOR PETITIONER

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 31 1971

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Clerk

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Attorneys,
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Washington, D.C. 20530.

Dated: March 31, 1971

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DOCKET NO. 24895

IN THE
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for the
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United States of America,

Petitioner,

v.

Federal Maritime Commission and
United States of America,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
THE FEDERAL MARITIME COMMISSION

BRIEF FOR PETITIONER

STATEMENT OF ISSUES

In the opinion of petitioner the issues presented
are:

(1) Whether the Commission acted contrary to Section
15 of the Shipping Act in approving, without hearing, an
agreement among major ocean carriers for the exchange
and cooperative development of sensitive individual-firm
data.

Docket No. 24895

IN THE

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FILED

APR 26 1971

for the

DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

United States of America,

Petitioner,

v.

Federal Maritime Commission
and United States of America,

Respondents.

AMENDMENT TO BRIEF FOR PETITIONERS TO
COMPLY WITH LOCAL RULE 8(e)

REFERENCES TO PARTIES AND RULINGS

Pursuant to Local Rule 8(e) petitioner notes that the Commission's Order, Approval of Agreement No. 9899, November 24, 1971 (Appendix, Certified Record, Item 7) sets forth the basis of the Order presented for review by this Court. Similarly, the Commission's Order, Approval of Agreement No. 9899-1, February 24, 1971 (Appendix, Certified Record, Item 19) sets forth the basis of the Agreement's three-month renewal effective on the date of that Order.

Also, parties to this litigation whose identity is not revealed by the caption on appeal are: (1) intervenors before this Court: Sea-Land Service, Inc. and American Export Isbrandtsen Lines, Inc.

(2) applicants before the Commission: American Export Isbrandtsen Lines, Inc.; Atlantic Container Lines, Ltd.; Dart Containerline; Hapag-Lloyd, A.G.; Seatrain Lines, Inc.; Sea-Land Service, Inc. and United States Lines, Inc.

Respectfully submitted,



ROBERT T. STERN
Attorney
Department of Justice

Dated: April 7, 1971

(2) Whether the Commission erred in approving that Agreement without adequately considering whether approval of the Agreement was necessary to provide important public benefits, whether it was no more restrictive than necessary, and whether the likely public benefits outweigh the anticompetitive detriments.

(3) Whether the Attorney General, acting on behalf of the United States, has standing to seek review of the Commission order as a "person aggrieved."

Pursuant to Rule 8(d) petitioner notes that on December 30, 1970, this case was before a panel of this Court consisting of Judge Robb and Judge Fahy, on petitioner's Motion For Stay. Judge McGowan, designated as a member of the panel, was absent and did not participate in the order denying stay.

STATEMENT OF CASE

Petitioner United States, acting through the Attorney General, has sought review of a Federal Maritime Commission order, issued November 24, 1970, which, without hearing, granted approval to Agreement No. 9899 under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814). This Agreement permits the seven principal steamship lines in the North Atlantic containership trade to exchange and cooperatively develop certain individual-firm financial data. The United States Department of Justice had

petitioned the Commission to hold a hearing on the agreement because it appeared on the face to raise significant competitive questions and because the applicants had not demonstrated whether and to what extent such exchanges of information were required to achieve any important public benefit. The effect of the Commission's approval of the agreement under Section 15 is to immunize the agreement, and the signatories' actions pursuant to it, from application of the antitrust laws, which petitioner is responsible for enforcing.

A. The Containership Trade

Containerization may be broadly defined as the process of transporting cargo in a box which is suitable both for carriage on a truck chassis or railroad flatcar and for loading directly in the hold of a steamship. 1/ The use of containers permits door-to-door shipments employing a combination of modes of transportation without the delay and expense of loading and unloading cargo and with a substantial reduction in damage and theft.

Although the concept has existed for decades, the substantial use of containers in ocean shipping began

1/ Matson Research Corporation, The Impact of Containerization on the U. S. Economy, vol. 1, p. 1 (1970).

in 1957 when a predecessor of Sea-Land Service, Inc. initiated a Gulf-Puerto Rico service. American companies subsequently inaugurated a container service to Hawaii and Alaska. 2/ In 1966 Sea-Land introduced container service between the United States and Europe.

Containerization has grown rapidly in the United States-European trade. By the end of 1971 it is estimated that the North Atlantic trades alone will be served by 94 full or partial containerships with a capacity of over 66,000 20-foot containers. 3/ The United States-European trade has been characterized as the life blood of containerization, generating 75 to 80% of the general cargo suitable for shipment in containers. 4/ The seven steamship lines party to Agreement No. 9899 transport the overwhelming majority of the containerized cargo in the North Atlantic trade. American Export Isbrandtsen Lines, Seatrain Lines, Sea-Land Service, and United States Lines are all American flag carriers; Atlantic Container Line, Dart Containerline and Hapag-Lloyd, are foreign-flag lines.

2/ Ibid.

3/ Id. table 17 at 116.

4/ The Port of New York Authority, Containerized Shipping: Full Ahead (1967).

B. Transatlantic Freight Conference Proceeding

About one year prior to the submission of Agreement No. 9899 to the Federal Maritime Commission, the same seven containership lines submitted Agreement No. 9813 for the Commission's approval. This Agreement provided for the establishment of a "Transatlantic Freight Conference" which would encompass substantially all of the containership trade in the North Atlantic in contrast with the conventional conference agreements which cover a relatively narrow range of ports at each end. Agreement No. 9813 is designed to establish a single Conference governing the rates and terms of service for containerized cargo moving between the entire range of East Coast United States ports to Western European ports -- both eastbound and westbound. To the extent that containerized freight is involved, it would effectively supersede some 19 existing North Atlantic conference and rate agreements. Because of its broad scope the agreement has commonly been referred to as the "Superconference Agreement."

In December, 1969 the Commission ordered a hearing with respect to Agreement No. 9813 and specified a long list of issues to be explored at that hearing. The Commission authorized the intervention and participation of numerous public agencies, existing conferences, and

independent steamship lines. To the present date the Superconference proceeding has heard the testimony of a single witness -- on behalf of the proponent lines. During most of this period the Hearing Examiner and the Commission have been occupied with highly controverted rulings upon the nature and extent of the intervenors' right of discovery from the applicant lines. In particular the applicant lines have vigorously resisted attempts by the Department of Justice to use depositions, interrogatories, and motions for the production of documents in an effort to secure information about underlying economic conditions of containership traffic in the North Atlantic and the need for and effects of the proposed Superconference Agreement.

C. The Federal Maritime Commission's
Approval of Agreement No. 9899

On September 21, 1970, Agreement No. 9899 was submitted to the Federal Maritime Commission for approval under Section 15 of the Shipping Act. (Certified Record, Item 1) The signatories to the Agreement were the seven principal containership lines which dominate the North Atlantic trade and which are the applicants for approval of the "Superconference Agreement." The three-page document states that the signatories have agreed:

to exchange information and to cooperate in developing information relating to:

(1) Cost of service, rates, rules and tariffs relating to traffic in intermodal containers;

(2) Practices in connection with the receipt and delivery of traffic in containers, including interchange with connecting land carriers or other transportation of intermodal containers between inland points and ports of loading or discharge from container ships; and

(3) The regularity of traffic flow; the seasonal and other fluctuation of traffic flows, and related data bearing on the level and frequency of service required by shippers.

The Agreement states that the purpose of exchanging information "is to determine whether uniform or agreed rules, practices, and procedures, including methods and procedures for the fair and uniform effectiveness or enforcing thereof" are needed and, if they are needed, tentatively to formulate such rules and practices. The Agreement provides that any resulting agreement as to uniform or agreed rules, practices or procedures may not be carried out without separate approval by the Commission under Section 15. A two-page transmittal letter signed by a vice-president of Sea-Land Service represented to the Commission that "there is an urgent necessity to bring order and stability into the trade covered by this Agreement, and the objective is to provide a forum through which the carriers can proceed in an orderly fashion

toward an ultimate Agreement." (Certified Record, Item 17)

The Commission gave official notice of the filing of Agreement No. 9899 and afforded an opportunity for the filing of comments by interested persons. Pursuant to that notice the Department of Justice submitted a timely Petition dated October 15, 1970 (Certified Record, Item 4). The Department first noted that the general standard for evaluation of Section 15 Agreements required a weighing of the public benefits from approving the Agreement against its likely anticompetitive effect. This balancing test, the Department suggested, required a "clear, factual understanding" of both the anticompetitive effects and public interest implications of the Agreement. The Department outlined the possible anticompetitive implications which would weigh against approval and which at least required a hearing. On the other hand, the proposed information exchange had been described by the applicants "in only the most general manner" and that the claimed public benefits of the Agreement were also "extraordinarily vague." The Department also noted that the Agreement had a "close but undefined nexus" with the Superconference Agreement, which was then subject to hearing in the Commission. The Department asserted that under Agreement No. 9899

the parties were seeking authorization to exchange "without clear purposes or goals" the kind of information which they had attempted to avoid producing in the Superconference case on the ground, among others, that its release would prejudice their competitive position. The Petition concluded with a request that a hearing be held with the Department participating and that inquiry be directed into five specific areas, including the nature of the problems in the trade, "justifications for the stabilization in the trade," the need for and likely adverse effects of information changes, the relationship between Agreement No. 9899 and the Superconference Agreement, and the extent to which the information changed would be available to other parties.

By order of November 24, 1970, the Commission approved the agreement without hearing to be effective from the date of approval (Certified Record, Item 7). The Commission stated that the agreement sought to deal with "serious transportation problems" in the North Atlantic trade involving "overtonnaging, instability and malpractices" and that conducting an evidentiary hearing "would delay for an unwarranted time action upon an agreement aimed at seeking solutions as rapidly as possible to immediate concerns." The other factors

cited by the Commission as justification for not conducting a hearing included: (1) that no action could be taken by the carriers on the basis of the information exchanged without further Commission approval; (2) that the exchange of information was to be voluntary; (3) that the antitrust precedents cited by the Department of Justice in its Petition were "inapposite" because they involved unregulated industries and dealt with action taken on the basis of exchanged information as well as the exchange itself. The Commission, nonetheless, acknowledged that exchanges of information alone "may involve some risk of further anticompetitive conduct incompatible with the criteria and requirements of Section 15." It indicated that it would minimize such risk by limiting its approval of the agreement to an initial period of three months (with permission for the applicants subsequently to seek a three-month extension) and by requiring that the matters exchanged, discussed and agreed be reported to the Commission.

On December 1, 1970 the Department of Justice filed a Motion with the Commission for an immediate ex parte stay of Commission's November 24, 1970 Order (Certified Record, Item 8) and an accompanying Petition for a stay until December 21, 1970, (Certified Record, Item 9), in order to allow the Department a period of time in which to consider whether to seek further review of the Commission's Order. On December 4, 1970 the Commission denied

both the Motion and the Petition (Certified Record, Item 10).

On December 11, 1970, the Department of Justice filed with this Court (1) a Petition for Review of the Commission's Order, (2) a Motion for Stay of the Commission Order Pending Review and (3) an Application for Temporary Stay.

After the intervention of Sea-Land Service Inc. and American Export Isbrandtsen Lines, Inc. pursuant to 28 U.S.C. 2348 and Rule 15(d) of the Federal Rules of Appellate Procedure, oral argument on the Application and Motion for Stay was held on December 30, 1971. By Order of the same date, this Court denied the stay applications without opinion, on the condition that the Commission modify its order of approval to require the submission to the Commission of each item of information exchanged pursuant to the agreement.

By Supplemental Order of December 31, 1970 (Record, Item 14) the Commission modified its approval of the Agreement to comply with the Court's condition.

On January 28, 1971, the Agreement's signatories requested the Commission to renew the Agreement for an additional three months (Certified Record, Item 16). The Commission gave official notice of the filing of the request for renewal and provided an opportunity for the filing of comments. Pursuant to that notice, the Department of Justice submitted a timely Petition, dated

February 12, 1971, incorporating the objections of its original Petition of October 15, 1970, and requesting a hearing on the renewal application. 5/ The Department also noted that after the information exchanges of the initial period, the signatories should have been able to, but did not, more specifically inform the Commission what competitively sensitive categories of information they proposed to exchange and why such exchanges are necessary to accomplish the aims of Agreement No. 9899.

By Order of February 24, 1971, the Commission approved the renewal of the Agreement without hearing. The Commission concluded that the conditions which warranted the initial approval of Agreement No. 9899 still existed; that the parties have exchanged information in an attempt to reach a solution to problems in the North Atlantic trades and had reported each such exchange in detail to the Commission; that the parties are considering a pooling agreement as a possible solution to the problems; and that "further discussions and exchanges appear to be necessary to bring to fruition the intent of the agreement and the Commission's reasons for initially approving

5/ The Department's Petition was submitted and the subsequent Commission Order was entered after the Commission's Motion to File Certification of the Record. It is assumed the Commission will file a Supplementary Motion with the Court certifying these two documents.

it." The Commission approved the agreement for an additional three-month period and accorded the parties the right subsequently to seek renewal for a third three-month period..

SUMMARY OF ARGUMENT

I

Agreement No. 9899 authorizes the seven principal competitors in the North Atlantic containership trade to exchange among each other information relating to their costs, rates, and business practices. This is information which in another context the carriers have characterized as "confidential" and "competitively sensitive." The Courts have frequently recognized that such exchanges of information give rise to substantial risks of anticompetitive effects upon the subsequent behavior of the parties. The exchanges authorized by Agreement No. 9899 would create similar risks, notwithstanding the fact that the Commission has required separate submission under Section 15 of any proposal for concerted action which the parties to the exchanges may negotiate and has imposed some reporting requirements.

The Department of Justice alerted the Commission to the anticompetitive dangers of Agreement No. 9899 and requested that the Commission hold a hearing to determine whether the Agreement should be approved. The Commission's refusal to do so is contrary to the plain requirements of Section 15. Two recent decisions of this Court, Marine Space Enclosures v. Federal Maritime

Commission, 137 U.S. App., D.C. 9, 420 F.2d 577, and City of Portland v. Federal Maritime Commission, Docket No. 24182, decided June 12, 1970, strongly emphasize that when significant antitrust questions are raised about an agreement submitted to the Commission for approval under Section 15, the Commission must hold a hearing to determine whether the agreement meets the substantive criteria of Section 15. The applicant for approval of an agreement having significant anticompetitive effects bears the burden of demonstrating that there is a public need for the agreement which outweighs the anticompetitive effect. Svenska Amerika Linien v. Federal Maritime Commission, 390 U.S. 238. Contrary to the reading of the Commission's counsel Marine Space Enclosures makes clear that the applicants can only meet this burden by a factual submission subject to testing in a hearing process. Marine Space Enclosures also considered and rejected other reasons which the Commission has again advanced for omitting a hearing. In particular, this Court's decision made clear that the need for prompt action on a proposed agreement does not permit the Commission to ignore the hearing requirement, however much it may justify an expedited hearing.

II

The Commission has previously challenged the standing

of petitioner to seek review of the Commission order. We demonstrate that petitioner is a "party aggrieved" by the Commission order. It became a party to the Commission proceeding by protesting Agreement No. 9899 and requesting that a hearing be held on it. It is "aggrieved" by the Commission order, among other reasons, because an erroneous approval of an agreement, contrary to the standards of Section 15, improperly restricts the authority of the Attorney General to enforce the antitrust laws. Many Courts have recognized the standing of an executive agency of the Federal Government to seek judicial review of a regulatory-commission order which adversely affects its statutory responsibilities.

ARGUMENT

I

AGREEMENT No. 9899 ON ITS FACE RAISED
SIGNIFICANT ANTITRUST QUESTIONS AND
THE COMMISSION WAS OBLIGED TO HOLD AN
EVIDENTIARY HEARING TO DETERMINE WHETHER
THERE WAS A NEED WHICH OUTWEIGHED THE
DETRIMENT TO COMPETITION

A. The Question of Whether Section 15 Generally
Requires Prior Commission Approval of Dis-
cussions and Negotiations

The basic scheme of Section 15 provides that certain categories of agreements involving ocean carriers and persons subject to Federal Maritime Commission jurisdiction must be filed with the Commission prior to being acted upon; that the Commission must after hearing determine whether to approve or disapprove the agreement under the criteria set forth in Section 15; and that agreements which are approved by the Commission are thereby immunized from attack under the antitrust laws.

The categories of agreement subject to Section 15 are necessarily general, and it is not always clear whether an agreement falls within any of the categories. When parties to an agreement are not certain whether it is subject to Section 15, they may submit the agreement to the Commission, move for a dismissal of the proceeding on the

ground of lack of jurisdiction, and move alternatively for approval of the agreement. In this case the signatories to Agreement No. 9899 did not ask the Commission to disclaim jurisdiction over their agreement under Section 15, and indeed it is clear that the principal reason for the filing of the agreement with the Commission was to obtain the antitrust immunity which would be conferred by Commission approval. 6/ No other person questioned the Commission's jurisdiction; and the Commission order does not mention the question.

We do not now raise a jurisdictional question. The Supreme Court decision in the Volkswagen case 7/ held that the Commission and the Courts are to give the categories of Section 15 an expansive interpretation to accomplish the Congressional purposes of according the Commission wide jurisdiction over concerted action which significantly affects ocean shipping. In the light of such an interpretation of Section 15 and given the generality and breadth of the information exchanges agreed to, it could be argued that Agreement No. 9899 was required to be submitted to the

6/ See Affidavit by J. Scott Morrison in opposition to Petitioner's Motion for Stay, dated December 18, 1970, p. 5.

7/ Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261.

Commission either as an agreement "controlling, regulating, preventing, or destroying competition" or as an agreement "providing for an exclusive, preferential, or cooperative working arrangement."

We wish to emphasize that acceptance of Commission jurisdiction in this case does not necessarily lead to the position that each substantive agreement among carriers must be preceded by an application to the Commission under Section 15 for authorization to engage in discussions about the possibility of such an agreement. Such an interpretation would unquestionably be at odds with the past practice. Since Section 15 gives the Commission authority to approve conference agreements, pooling agreements and other such restrictive agreements upon appropriate findings, it is reasonable to infer that in normal circumstances persons subject to the Shipping Act have the right to meet, discuss and negotiate such a proposed agreement without the need for a prior authorization by the Commission under Section 15. 8/ See Pacific Westbound Conference v. Federal Maritime Commission, C.A.5 Docket No. 23506, decided March 19, 1971, p. 19.

8/ We do not intend to question the authority of the Commission to adopt rules or regulations supervising or limiting such discussions, requiring reports or the attendance of official observers, etc.

We emphasize again that neither the Department of Justice nor anyone else of whom we are aware has ever taken the view that discussions and negotiations of possible Section 15 agreements must themselves be approved by the Commission under Section 15. The fact that the signatories of Agreement No. 9899 have submitted that agreement to the Commission for approval under Section 15 is highly significant of the fact that this involves something other than a joint undertaking to discuss and possibly negotiate a substantive agreement. And in fact Agreement No. 9899 does not encompass "discussions" at all. What the parties to Agreement No. 9899 "agree" to do is to exchange and cooperatively develop the listed categories of information. As we shall detail below, the agreement provides for no merely casual or incidental exchange of information but in the broadest possible terms authorizes the exchange or cooperative development of every category of sensitive individual-company data. Plainly the applicants themselves have recognized that their desire to be totally free to engage in such broad exchanges of sensitive data significantly sets their discussions apart from the normal discussions and exchanges which precede the submission of a Section 15 agreement to the Commission.

B. Since the Commission took jurisdiction over the Agreement under Section 15, it was obliged to consider it in the light of the statutory criteria for approval

Once the Commission had assumed jurisdiction over Agreement No. 9899, it was of critical importance that the Commission fully apply the substantive and procedural standards of Section 15 for approval of such agreements. It cannot validly be argued that certain categories of agreements are important enough to be approved and immunized from the antitrust laws by the Commission, but not important enough to require the Commission's adherence to the statutory standards. This Court has made clear that the power to exempt an agreement from the antitrust laws is an extraordinary one and is to be exercised subject to strict controls. "The condition upon which such [immunization] authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute". Isbrandtsen Co., v. United States, 93 U.S. App. D.C. 293, 299, 211 F.2d 51, 57.

The Supreme Court has clearly explained the relevance of competition to the criteria which the Commission must

apply in passing upon Section 15 Agreements. In Federal Maritime Commission v. Svenska Amerika Linien, 390 U.S. 238, the Supreme Court stated that the "antitrust concepts are intimately involved with the standards Congress chose" for Section 15 agreements and that "by its very nature an illegal restraint of trade is in some ways contrary to the public interest". (390 U.S. at 244, 245). The Court went on to explicitly approve the elaboration of the "public interest" criteria which the Commission had formulated in that case: that restraints which interfere with the policies of the antitrust laws will be approved only if the applicants can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." 390 U.S. at 243.

Application of this standard requires a factual inquiry by the Commission into the nature of the transportation need which the Agreement is designed to meet, and the reasons why the restraints are necessary and why no less anticompetitive solutions will suffice. We demonstrate next that Agreement No. 9899 on its face raised antitrust questions of sufficient importance to have required the Commission to undertake such a factual inquiry.

C. The Agreement Raises Significant Antitrust Questions

(1) In demonstrating that Agreement No. 9899 on its face raised significant antitrust questions, we start with the proposition that the kinds of individual-firm data which it authorizes to be exchanged and cooperatively developed are those which businessmen ordinarily regard as highly sensitive and which, in a competitive environment, they would not wish their competitors to have. In another context the carriers who are party to Agreement No. 9899 have repeatedly told the Commission that such information is competitively sensitive and that its divulgence would be detrimental to competition. The Stern Affidavit (submitted to the Court in support of Petitioner's Motion for stay pending review, December 11, 1970) details (§11), many such statements made on behalf of the carriers in its pending "Superconference" proceeding. Even if it were not so completely confirmed by every day experience, we think the Court would be entitled to take these carriers' word for the competitively sensitive nature of the data covered by

Agreement No. 9899. 9/

(2) The antitrust precedents which were cited to the Commission (Certified Record, Item 4, p. 4) clearly demonstrate that while exchanges of information as to cost and price among competitors may not be invariably unlawful, they require very careful scrutiny as to their purposes and effects. After detailing the various items of cost and production information which were systematically reported under the information-exchange arrangement at issue in American Column & Lumber Co. v. United States, 257 U.S. 377, 395-96, the Supreme Court said:

Plainly it would be very difficult to devise a more minute discovery of everything

/ In its Motion for Production of Documents and in its Interrogatories submitted in the Transatlantic Freight Conference proceeding, the Department of Justice requested specific kinds of financial information from each container carrier including: acquisition costs, capital improvement costs, depreciation costs and current book value of owned vessels, docks, terminals, cranes, containers, tractors and trailer chassis; charter and outfitting costs of chartered vessels; charges for leased containers and terminal and dock facilities; operating costs and revenues for each vessel voyage; inland interchange costs and anticipated operating costs per revenue ton of new vessels as well as financial information in studies and projections of the industry. (Affidavit Appendix I) With one relatively minor exception, counsel for the carriers has refused to supply any of this data. Each of the items listed above appears to be within the scope of the information authorized to be exchanged and cooperatively developed under Agreement No. 9899.

connected with one's business than is here provided for by this Plan, and very certainly only the most attractive prospect could induce any man to make it to his rivals and competitors.

The Court went on to analyze the exchange in detail and found that its purpose and effect were to restrict competition. Similarly, in United States v. Container Corp. of America, 393 U.S. 333, the Supreme Court found that a systematic price exchange program in the context of the particular industry in which it was practiced, was likely to promote the anticompetitive aim of stabilizing prices. Thus the existence of a systematic and detailed information exchange program among competitors may well move price behavior which otherwise would be regarded as mere "conscious parallelism" into the area of combination or conspiracy in violation of the Sherman Act. 10/

10/ In United States v. General Motors Corp., 384 U.S. 127 reversing 234 F. Supp. 85 (S.D. Cal.), the Court found that consciously parallel behavior may well suggest an antitrust violation when viewed in the presence of additional facts. Similarly, in National Lead Co. v. Federal Trade Commission, 227 F. 2d 825 (7th Cir.) rev'd on other grounds, 352 U.S. 419, the "protective mantle" of conscious parallelism was removed because of discussions concerning prices among the competitors. See also, Esco Corp. v. United States, 340 F.2d 1000 (9th Cir.) In Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir.) conscious parallelism was regarded as a violation in the light of the additional evidence of the exchange of extensive price information among the "few friendly sellers" in an oligopolistic market.

(3) The Commission dismissed these antitrust precedents as "inapposite since they involved unregulated industries and dealt with action taken on the basis of exchanged information as well as the exchange itself." 11/ (Commission Order of November 24, 1970, Certified Record, Item 7, p. 3) Thus the Commission relies heavily upon its belief that Section 15 would give it full control over any action which the parties might take on the basis of the exchanged information. In fact, exchanges of information give rise to a number of risks of subsequent anticompetitive behavior notwithstanding the fact that Section 15 requires prior Commission approval of concerted action. This can be illustrated by outlining a number of hypothetical cases of what may result from the Commission's approval of Agreement No. 9899:

(a) The parties may meet, exchange confidential individual-firm data, but be unable to agree upon any joint program of action to be submitted to the Commission under Section 15;

Compare
11/ / Marine Space Enclosures v. Federal Maritime Commission, 137 U.S. App. D.C. 9, 420 F.2d 577, 585:
"[A]nticompetitive restraints, the kind that would be illegal or of doubtful legality if used in unregulated industry, are in some ways contrary to the public interest that shapes rules governing the persons in directly regulated industry." (420 F.2d at 585).

(b) The carriers may meet, exchange information and submit an agreement on joint action to the Commission; but the Commission will be unable to approve such agreement under the criteria of Section 15;

(c) The carriers may meet, exchange information, and then proceed unlawfully to engage in concerted action without Commission approval;

(d) The carriers may meet, exchange information, and then alter their individual competitive behavior, not pursuant to explicit conspiracy but simply as a result of each company's changed understanding of its individual self-interest brought about by the knowledge of its competitors' cost and price data.

In each of these cases the Commission's authority to approve agreements for joint action under Section 15 would not prevent the exchange of sensitive cost information from having a detrimental effect upon the subsequent competitive conduct of the participants.

We submit that information exchange programs among regulated ocean carriers involve risks of serious injury to the public interest in competition just as they do in unregulated industries -- perhaps not exactly the same risks, but serious risks nonetheless. Our basic position is that the public should not have been exposed to these risks until the Commission on a factual record had evaluated their magnitude and determined that they are necessarily incurred in order to secure some important public benefit.

(4) The Commission's November 24, 1970 Order appeared to acknowledge that the information exchanges would create some risks of anticompetitive effects; it suggested, however, that its conditions (a) limiting the period of the agreement to six months (the initial approval for three months plus the renewal for an additional three months) and (b) imposing a requirement for reporting by the carriers of the matters exchanged and discussed would minimize those risks. We submit, however, that the Commission had no adequate basis in fact for predicting that its conditions would sufficiently protect the public and indeed that such facts as are presently known suggest that they will not.

The six-month time limitation will not significantly limit the parties in exchanging and cooperatively developing the information that they desire to get from one another. Each of the companies individually had ample opportunity to prepare for the time when the Commission would authorize exchanges to begin. The principal effect of the Commission's condition may be to accelerate the pace at which the exchanges take place. In any event, the Commission has already shown a disposition to grant extensions of the time limit

upon representation by the parties that they are still engaged in the negotiations over a substantive agreement. See p.12 supra.

The reporting requirement, even as supplemented by this Court's condition, p.11 supra, does not seem likely to significantly reduce the risk of injury to the public interest either during or after the exchange period. A reporting requirement would be of some real value if the Commission had imposed major substantive limitations upon the kind of information which may be exchanged. The reports and copies of documents would then enable the Commission to determine whether the limitations were being observed. But in fact, the Agreement is broad enough to encompass every conceivable item of individual-firm financial data relating to its containership operation, and the single substantive limitation imposed by the Commission was the exclusion of the Mediterranean ports. In these circumstances, the reporting requirement cannot be regarded as a major protection. After-the-fact reporting requirements can do little, if anything to remedy the adverse effects of exchanges of information which have already taken place. By its very nature once information is exchanged in documentary or verbal form, it is absorbed into the

fund of knowledge upon which individual firms base their business decisions. If, for example, the discussions and exchanges fail to produce a substantive agreement which the Commission can approve under Section 15, it will be impossible for the Commission to eradicate the knowledge that any party obtained through the exchanges or to direct that the party proceed in its business decisions as if it did not possess such knowledge.

(5) The intervenors have suggested that Petitioner's concern about the competitive effects of exchanges of information pursuant to Agreement No. 9899 is not genuine in view of the efforts which the Department of Justice is making to obtain discovery of costs and other financial data from the applicants in the Superconference proceeding. The allegation is groundless. The Department of Justice has been continually mindful of a possible dilemma arising out of the Superconference proceeding: If the record fails to include adequate information about the underlying economic conditions of the North Atlantic containership trade and the positions of the various carriers in that trade, there is a danger that an agreement of enormous importance and possible anticompetitive consequence will receive

erroneous approval; on the other hand if the necessary information is obtained, there is a danger that each carrier's competitively sensitive information will be revealed to the others with a detrimental effect upon competition in the event the agreement is disapproved. In the Department's judgment the more serious risk lay in not obtaining sufficient relevant information in the record, especially since there are methods of greatly reducing the potential mischief in production of individual carrier's confidential data.

On a number of occasions the Department has made clear to the Commission that it does not question the authority of the Commission to fashion a protective order to deal with a confidentiality problem which would be raised by the production of particular documents or data. Nor does the Department question the appropriateness of the Commission doing so upon a proper showing, and it indeed has suggested several techniques which might be considered. 12/ Some documents may even be

12/ The Department's suggestions have included (1) the use of a neutral body to process the information in order to protect confidentiality without removing its usefulness and (2) the dissemination of information to non-competitor intervenors (including the Department of Justice) under compulsion not to disclose. (Transatlantic Freight Conference, FMC Agreement 9813, Docket No. 69-58, Reply of Department of Justice to Respondent's Objections to Discovery, January 25, 1971, pp. 38-39).

of such a highly confidential nature and so ill-suited to any available protective techniques that the Commission may appropriately withhold them from any production. The Superconference proceeding, however, has not yet advanced to the point where counsel for the applicants has made any specific showing of the need to protect the confidentiality of particular documents or categories of documents called for in the Department's discovery motions.

D. The Shipping Act And This Court's Holdings Require
A Hearing Before Approval Of An Agreement With
Significant Antitrust Implications

The question whether the Commission was required to conduct a hearing on Agreement No. 9899 is governed by two recent decisions of this Court, Marine Space Enclosures v. Federal Maritime Commission, 137 U.S. App. D.C. 9, 420 F.2d 577 and City of Portland v. Federal Maritime Commission, Docket No. 24,182, decided June 12, 1970. These two cases make it unmistakably clear that when significant antitrust questions are raised about an agreement submitted to the Commission for approval under Section 15, the Commission must hold a hearing to determine whether the agreement meets the substantive criteria of Section 15. All of the reasons which the Commission has advanced in this case for refusing to conduct a hearing have already been considered and found to be insufficient in Marine Space Enclosures and City of Portland.

In Marine Space Enclosures the City of New York authorized the Port of New York Authority to construct and maintain a new terminal to handle maritime passenger traffic on city-owned property. The Port Authority was to lease the facility from the city at a rent, calculated

to amortize the city's \$60,000,000 cost over a 20-year period. One accompanying restrictive covenant required that the city neither promote another public terminal nor allow the construction of a private terminal within 70 years. All steamship lines contracting to use the passenger facility had to agree to use no other such facility in the city. In turn the Port Authority committed itself to exclude from the terminal any carriers who would not sign a similar exclusive patronage contract. This Court held that the Commission had erred in approving the Agreements without hearing after the possible anticompetitive effects were called to its attention. It remanded the case to the Commission to fashion a form of hearing which would allow for adequate consideration of the issues of whether the agreement was unjustly discriminatory or contrary to the public interest.

In City of Portland, Japanese containership operators serving the trans-Pacific trade between Japan-Oregon and Washington were alleged to have agreed on a three-vessel containership pooling arrangement excluding Portland from service. One of the operators had served Portland historically and was said to be willing to continue the service but for the binding majority vote.

The Commission, stating that it would investigate these allegations subsequently, approved an agreement which would have authorized the operators to serve the Pacific Northwest without serving Portland.

Upon petition of the City of Portland, this Court granted a stay to be effective after 60 days. The Court held that such an agreement "should not have been disposed of without a hearing on the basis solely of submissions by the applicants, possibly including oral submissions." The Court stated that only in rare emergency situations would the public interest be sufficiently protected by a hearing subsequent to approval.

1. The Plain Terms of Section 15 Require a Hearing in This Case

In Marine Space Enclosures (420 F.2d at 583), the Court found the hearing requirement to derive from the plain language of Section 15, which provides:

The Commission shall by order, after notice and hearing, disapprove, any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to

operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. [Emphasis added]

The Court noted that "an over-literal reading of Section 15 might generate the notion that a hearing is required only if the Commission disapproves an agreement and not if the Commission merely grants approval." But such an interpretation would be a "travesty". (420 F.2d at 583). "What the words of Section 15 fairly indicate is that an appropriate hearing shall be held prior to either approval or disapproval." (420 F.2d at 584).

2. The Agreement is Neither Routine nor De Minimis

This Court observed in Marine Space Enclosures that "there may be an implied exception of the literal command of Section 15 when the Commission has made appropriate determination that certain agreements are of purely routine nature or have an impact on commerce that the Commission finds is de minimis." 420 F.2d at 584. Neither of these possible exceptions could be applicable in this case. In the first place, such an "appropriate determination" would almost certainly have to be made through prospective rule-making of general applicability

rather than in an ad hoc determination regarding a particular agreement already filed. 13/ Ibid. Secondly, Agreement No. 9899 is plainly neither routine or de minimis. Far from being a routine, Agreement No. 9899 may well be a totally unprecedented agreement in the Commission's experience under Section 15. We are not aware of any other application which has sought Commission approval, and consequent immunization from the antitrust laws, of an agreement for the exchange and cooperative development of competitors' cost and price data. For the reasons we have stated above, this particular agreement is not de minimis in its probable effects upon the subsequent conduct of the major container-ship carriers party to it. The Commission itself did not treat this agreement as if it were de minimis in

13/ A recent amendment to the Shipping Act provides:

The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of such persons from any requirement of this chapter, or Inter-coastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce. [46 U.S.C. 833a (Supp. V, 1969)]

purpose or effect. Even without the enlightenment that an evidentiary record could be expected to provide, the Commission recognized that the exchanges of information would involve risk of anticompetitive conduct (Certified Record, Item 7, p. 4), and it devised some conditions in an effort to deal with that risk. While we do not believe that the Commission's conditioning of its approval takes the place of a hearing before approval, the fact that the Commission imposed them negates any labeling of the probable effects of the Agreement as de minimis.

3. The Applicants' Presentation Did Not Obviate The Need For Hearing

Commission counsel has defended the denial of a hearing primarily on the ground that there is yet another exception to the requirement of Section 15, recognized by this Court in Marine Space Enclosures: "when 'an applicant for approval of a restrictive agreement [satisfies] the burden of demonstrating the need for anti-competitive restraints. . . ." 14/ Counsel suggests that in this case the applicants were able to satisfy

14/ Respondent's Response to Application for Temporary Stay, pp. 15-16.

their burden of demonstrating that the need outweighs the anticompetitive effects, without a hearing.

The argument is based upon a complete misreading of Marine Space Enclosures. ^{15/} To be sure the applicant must bear the burden of demonstrating the need for anticompetitive restraints. But the whole point of Marine Space Enclosures was that the applicant must make that demonstration at a hearing or through some evidentiary procedure that in substance accomplishes the fact-finding purposes of a hearing.

A lengthy section of the Court's opinion (420 F.2d at 589-90) carefully considers the basic elements of hearing which are required when significant competitive questions are raised:

The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama. In some cases briefs and

^{15/} Respondent's counsel cites the Court's opinion at p. 583, where the following sentence appears:

In *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244, 88 S.Ct. 1005, 1009, 19 L.Ed.2d 1071 (1968), the Court approved the FMC's policy of shifting to an applicant for approval of a restrictive agreement the burden of demonstrating the need for anticompetitive restraints, noting "By its very nature an illegal restraint of trade is in some ways 'contrary to the public interest.'"

oral argument may suffice for disposition. Ordinarily, however, antitrust issues do not lend themselves to disposition solely on briefs and argument. Even though there may be no disputed "adjudicatory" facts, the application of the law to the underlying facts involves the kind of judgment that benefits from ventilation at a formal hearing. [Footnotes omitted]

In any event this would be the least appropriate case in which to contend that the applicants had satisfied their burden of proof without the need for hearing. The entire submission of the applicants to the Commission consisted of the three-page Agreement itself, (Certified Record Item 1) and the one-and-a-half page transmittal letter (Certified Record Item 17) submitted by one of the signatories. The Agreement makes no statement regarding the need for information exchanges of the kind and scope agreed to, and the transmittal letter does no more than make some general and undocumented statements about problems existing on the North Atlantic container-ship trade. That was the total extent of the showing made on the public record in support of information exchanges conceded by the Commission to involve the risk of anticompetitive consequences.

Plainly there was no way that the Commission could have applied the principle of Svenska Amerika, supra, on

the basis of the materials which the applicants submitted to it. There was no specific statement by the applicants as to what they seek to accomplish by Agreement No. 9899, no statement of what specific items of information they desire to exchange among each other, and no explanation as to why particular items of information are needed in the light of the purposes of the discussions.

In approving the Agreement on the basis of such a showing, the Commission did not exercise its "active and independent duty to guard the public interest" by independently exploring whether "alternative courses, other than those suggested by the applicants" (420 F.2d at 585) would result in less injury to competitive interests. The Commission order gives no evidence that it has independently addressed itself to the nature and extent of the public need for an exchange among competing carriers of competitively sensitive business data; the Commission order gives no evidence that it has independently considered whether alternatives with less adverse effect upon competition would provide the carriers with the information they legitimately require for their discussions.

4. Urgent Need For Approval Does Not
Remove the Hearing Requirement

As it did in Marine Space Enclosures, the Commission has again relied upon a need for urgent approval of the

Agreement which would not be met if the Commission were obliged to take the time to hold a hearing. In this case the Commission has said that a hearing "would delay for an unwarranted time action upon an agreement aimed at seeking solutions as rapidly as possible to immediate concerns" (Certified Record, Item 7, p. 4). Just as in Marine Space Enclosures, these recitations are "ample in rhetoric and 'sparing in detail'" (420 F.2d at 588). The Commission's references to "serious transportation problems" and "immediate concerns" are without support in the record save for the sparest and vaguest assertions of the carriers submitting the agreement.

In any event, Marine Space Enclosures makes clear that the adequacy of the record to support the Commission's findings about an urgent need for approval is irrelevant. "If time was of the essence, the appropriate solution was not to bypass entirely the statutory requirement of hearing, but to structure an expedited hearing." (420 F.2d at 588)

II

PETITIONER IS A "PARTY AGGRIEVED"
BY THE COMMISSION ORDER AND IT THUS
HAS STANDING TO SEEK JUDICIAL REVIEW

Since the Commission's response to the Motion for Stay raised a question as to petitioner's standing to maintain the petition for review, we briefly set forth below the basis for petitioner's standing.

Section 2344 of the Judicial Code (28 U.S.C. 2344) provides that "any party aggrieved" by a final order of the Federal Maritime Commission may file a petition to review that order in the Court of Appeals. We do not understand the respondent to deny that the Department of Justice was a "party" to the proceeding which resulted in the Commission's Order of November 24, 1970. Since the Commission issued a final order without even convening the hearing that was required under Section 15, there was no opportunity for anyone formally to become a "party". Nonetheless the Department of Justice involved itself in the Commission proceeding to the maximum extent which the Commission's truncated handling permitted: it filed a timely protest of Agreement No. 9899 and a timely request for hearing; when its protest and request for hearing

were rejected by the Commission, it filed a pleading which the Commission treated as a petition for reconsideration and denied. When the Commission gave notice of the proposed extension of its approval of the Agreement, the Department protested and requested a hearing. In every meaningful sense the Department was "party" to the Commission proceeding below, just as it has been a party to many other Federal Maritime Commission proceedings including the "Superconference" proceeding presently in progress. In Far East Conference v. United States, 342 U.S. 570, 576 (1952), the Supreme Court noted that the Commission's predecessor agency had regularly considered the United States (as represented by the Attorney General) to be a "person" entitled to participate in its proceedings under the Shipping Act. The Court pointed out that in addition to representing the interests of the United States in competitive policies, the Attorney General represents the substantial interest of the United States as a shipper in ocean transport.

Since petitioner was clearly "party" to the Commission proceeding, the question remaining as to standing is whether it is "aggrieved" by the Commission Order. The factual predicate for petitioner's aggrievement is clear and simple: The Commission has approved an agreement of

carriers under Section 15 of the Shipping Act in a manner which, in petitioner's view, satisfies neither the procedural nor the substantive requirements of that section. Under Section 15, agreements approved by the Commission are exempt from the antitrust laws. Thus the direct effect of the Commission's approving an agreement under Section 15 is to cut off all authority of the Attorney General to proceed against that agreement pursuant to his regular responsibility of enforcing the antitrust laws.

While the Commission has the basic responsibility for determining when antitrust immunity should be conferred, erroneous conferrals of immunity will have direct and important effect upon the Attorney General's exercise of his responsibilities.^{16/} In Marine Space Enclosures v. Federal Maritime Commission, 137 U.S. App. D.C. 9, 420 F.2d 577, 592 (1969), this Court referred to the antitrust immunity effect as a significant factor establishing the standing of a private person to seek judicial review of a Commission order.

^{16/} It is well established that the Attorney General's responsibility for fostering competition goes substantially beyond the duty of bringing suits against violation of the Antitrust laws. Thus, for example, it was held in United States v. American Bell Telephone Co., 128 U.S. 315, 367-368 (1888), that the Attorney General had standing to seek the invalidation of patents based on competitive considerations.

In the face of this strong factual predicate for the aggrievement of the Attorney General the Commission has asserted only the principle that the government may not create a justiciable controversy against itself (response to the Department's application for temporary stay, December, 1970, p. 6). The Commission acknowledges that this principle has been held inapplicable to actions by the United States to seek review of Interstate Commerce Commission orders which adversely affect the interest of the United States as shipper (an interest which is by no means absent in this case). What the Commission does not acknowledge is that this principle has similarly been found inapplicable to many other situations in which an executive agency of the United States seeks review of a regulatory commission order. In Udall v. Federal Power Commission, 123 U.S. App. D.C. 209, 358 F.2d 840 (1966), rev'd on other grounds, 387 U.S. 428, both this Court and the Supreme Court recognized the standing of the Secretary of Interior -- based essentially on the Secretary's responsibilities to protect the nation's natural resources -- to obtain judicial review of a Federal Power Commission order issuing a hydroelectric project license. See also, Chapman v. Federal Power Commission, 345 U.S. 153 (1953); Government of Guam v. Federal Maritime Commission, 117 U.S. App. D.C. 296, 329 F.2d 251 (1964) and authorities cited therein. In United States v. Federal Communications Commission, Docket No. 21147,

this Court considered the Attorney General's petition to review an FCC order approving International Telephone & Telegraph Company's acquisition of American Broadcasting Companies, Inc., and no challenge was made to the Attorney General's standing by the Commission or the intervenors.^{17/} In United States v. Interstate Commerce Commission, 337 U.S. 426 (1949), the Supreme Court adjudicated the merits of the Attorney General's appeal from ICC approval of the "Northern Lines" railroad merger -- an appeal based essentially on competitive considerations -- without any question of his standing.

The only two cases which have been cited by respondent in support of its challenge to the standing of the Attorney General concern civil damage suits. In these two cases, the courts traced through the nominal plaintiffs and defendants to determine that the ultimate pecuniary interest involved on both sides of the lawsuits was that of the United States. Then, applying "the laws and rules of practice obtaining in like cases between private parties," the courts ruled that there was no real case or controversy^{18/}

^{17/} The petition was dismissed as moot after the parties' abandonment of the plan of merger.

^{18/} Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311, 312 (2d Cir. 1945), cert. denied, 326 U.S. 746; Defense Supplies Corp. v. American-Hawaiian S.S. Corp., 64 F. Supp. 459, (S.D.N.Y. 1945).

That is clearly not the situation here. This is not a damage suit where it is requested that money be transferred from one government pocket to another with no net effect. . Quite obviously, a favorable ruling on the petition for review will result in reversal of the Commission Order approving the agreement and remand for a Commission hearing. Conversely, denial of the petition will allow the Order to stand -- a very different result.

CONCLUSION

For the reasons stated, the order of the Federal Maritime Commission approving Agreement No. 9899 should be set aside and the case remanded to the Commission for hearing in accordance with Section 15 of the Shipping Act.

Respectfully submitted,

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Dated: March 31, 1971

STATUTORY APPENDIX

SHIPPING ACT, 1916, SECTION 15 (46 U.S.C. 814)

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that

tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. As amended Oct. 3, 1961, Pub.L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub.L. 88-275, 78 Stat. 148.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET NO. 24895

UNITED STATES OF AMERICA,
Petitioner,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL MARITIME COMMISSION

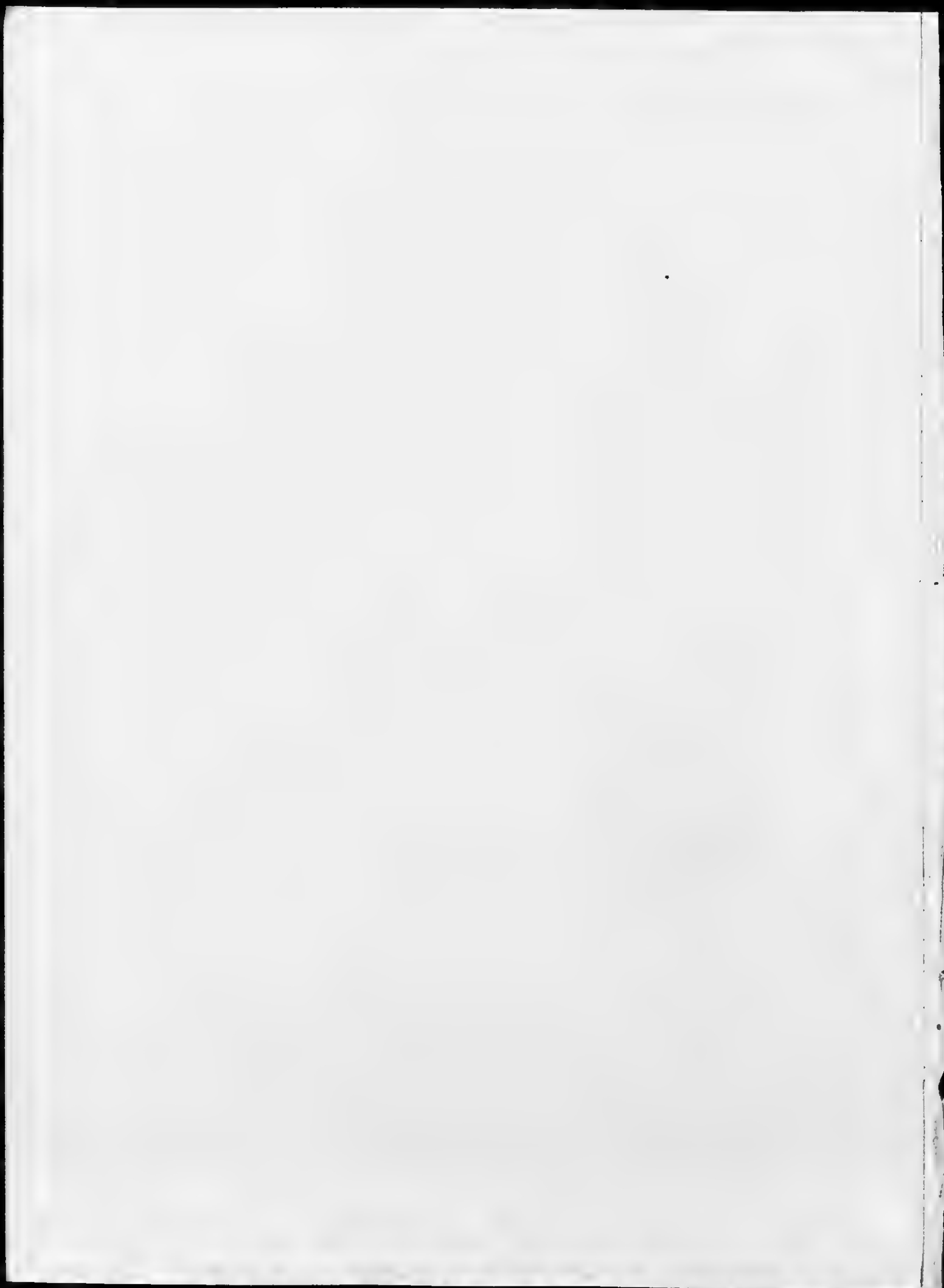
BRIEF FOR INTERVENOR,
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United States Court of Appeals
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FILED MAY 3 1971

Nathan J. Paulson
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ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL MARITIME COMMISSION

BRIEF FOR INTERVENOR,
SEA-LAND SERVICE, INC.

STATEMENT OF ISSUES

While we have no quarrel with petitioner's statement of issues or the structure of its argument, we focus on two particular issues presented in this proceeding. In so doing, we anticipate that the Federal Maritime Commission (Commission) will address itself to the other matters raised by petitioner.

Accordingly, we proceed directly to the following issues:

I. Whether a suit by the United States against an administrative agency of the United States and the United States itself, presents a justiciable case or controversy within the meaning of the Constitution, where the United States is the only party complaining of the agency's action.

II. Whether the impact of Agreement No. 9899, as approved by the Commission, on maritime commerce is *de minimis*.

STATEMENT OF CASE

Intervenor does not take issue with petitioner's general presentation of the facts of the case, and therefore has omitted the statement of the case, except for such details as are emphasized in Part II of intervenor's argument.

SUMMARY OF ARGUMENT

I. The issue of whether a case or controversy exists, as presented in this case, is distinct from the question of whether the Justice Department has standing in the matter; it relates solely to the fact that the United States is here seeking relief against an administrative agency of the United States. Intervenor concedes that, were there a valid case or controversy presented, the Justice Department would have standing to be heard on behalf of the United States.

This case involves a dispute between two federal agencies: the Justice Department and the FMC, and as such constitutes a suit by the United States against the United States. Moreover, the gravamen of the United States' complaint in this matter lies in the FMC's denial of its demand for a hearing prior to making the ruling in question. Under such circumstances there can be no actual case or con-

troverly such as is required by the Constitution for jurisdiction in the federal courts.

There appears to be no case decided by any federal court which is precisely in point with the issue here presented. The Justice Department cites a number of cases in its brief, all of which are distinguishable. Intervenor submits, however, that the proper approach in this matter is that taken by the court in *United States v. Easement and Right of Way, Etc.*, 204 F.Supp. 837, 839: "there could not be any issue between [two agencies of the United States], both being the United States, which this Court could adjudicate."

It is a significant feature of this case that the United States is the only petitioner in this matter, the only party before the Court seeking to assert the invalidity of the FMC action. Intervenor submits that under the administrative system adopted by Congress, the public, and not the Justice Department, are the proper parties to assert the impropriety of an FMC ruling such as this one. Clearly the Justice Department may support a private petitioner before this Court if it feels his position to be just; it may *not*, however, create a case or controversy where none exists, by bringing such an action as the one at bar, in the absence of a private petitioner alleging in his own right, the impropriety of the FMC decision.

II. Agreement No. 9899 is a classical "agreement to agree." That is to say, Agreement No. 9899 is a cooperative working arrangement providing for the exchange of information and for cooperation in developing information with a view toward, and in furtherance of, reaching a consensus on a substantive agreement which would control and regulate competition. However, any such substantive agreement would itself have to be filed with, and approved or disapproved after hearing by, the Commission. In approving Agreement No. 9899 the Commission has narrowed the geographic scope of the Agreement, has limited the period during which the Agreement is effective, has

required that the parties keep the Commission informed as to activities carried out under the Agreement, and has required the filing with the Commission of documents exchanged by the parties during the course of such activities.

Premises considered, we urge that the Agreement is "*de minimis*" in the proper frame of reference. That frame of reference is "impact on commerce." Since this Agreement is totally devoid of substantive provisions, not one pound of the foreign commerce of the United States will move pursuant to any rate or any practice established by the provisions of Agreement No. 9899. Thus, in this context, "impact on commerce" is not simply "*de minimis*;" it is non-existent.

Accordingly, the only "impact on commerce" that could conceivably have a nexus with Agreement No. 9899 would be the achievement by indirection rather than through the carrying out of the Agreement. The Commission has conditioned approval with safeguards which, in its expert judgment, minimize the possibility of achievement by indirection. In any event, the very hearing sought by petitioner would clearly provide an opportunity for conscious parallelism at least equal to that which exists through approval of Agreement No. 9899 without hearing but with the safeguards that the Commission has attached to its approval.

ARGUMENT

I. THIS PROCEEDING DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY OF WHICH A FEDERAL COURT MAY TAKE COGNIZANCE.

The right of the Justice Department to maintain this petition is contingent upon the resolution of two related issues: (1) whether a valid case or controversy exists between the parties; (2) whether the Justice Department has standing to litigate the case. Although

these issues are intimately related,¹ it is clear that they are in fact separate issues as presented here:

(1) The case or controversy issue in this case relates solely to the fact that the United States is a party to both sides of the litigation. In such circumstances, it is intervenor's position that there can exist no "actual controversy between adverse litigants"² such as is required to give rise to federal jurisdiction under the Constitution.

(2) The standing issue, by contrast, is not directed to the dual roles played by the United States in this case—rather it involves the extent of the actual interest of a particular party in the proceeding, or his capacity to represent persons who have the requisite interest in the proceeding.

Intervenor concedes that, were there a valid case or controversy in this matter, the Justice Department would have standing to be heard. It is, however, intervenor's position that there can be no case or controversy under the facts and circumstances here presented.

It is axiomatic that before jurisdiction can accrue to the federal courts, there must exist a case or controversy on which the Federal Judicial Power is capable of acting.³ The controversy must be "real and substantial," admitting of specific relief through a decree of con-

¹ Standing is a special aspect of the general case or controversy requirement. If a party has no standing to litigate a dispute, there can be no case or controversy. The converse is not true, however. It may be that a party has standing to represent certain interests, but there is simply no actual controversy involving those interests.

² *Muskra v. United States*, 219 U.S. 346 (1911).

³ See e.g., *Koll v. Wayzata State Bank* 397 F.2d 124, 127 (8th Cir. 1968); *Flight Engr's Intern. Ass'n v. Continental Air Lines, Inc.*, 297 F.2d 397, 401-02 (9th Cir.), cert. denied 369 U.S. 871 (1961); *Coffman v. Federal Lab., Inc.*, 55 F.Supp. 501, 504 (D.N.J. 1944), aff'd 323 U.S. 325 (1945).

clusive character—as distinguished from an opinion advising what the law would be on a given set of facts.⁴ It must be “definite and concrete,” touching the legal rights of the parties.⁵

In essence, this case involves a dispute between two federal agencies: the Justice Department and the FMC. From the Justice Department’s viewpoint or from the FMC’s viewpoint, such a dispute may involve a real conflict. But the fact remains that this is a suit by the United States against the United States.⁶ To those outside of government, those who must deal with the various agencies, this is merely an internal conflict—the federal government divided against itself.⁷

The Supreme Court considered issues similar to those presented here in *United States v. I.C.C.*⁸ In that case, the Federal Government sought to overturn an I.C.C. decision denying it reparations for certain allegedly illegal charges made upon it by railroad lines in connection with shipment of government cargoes. Although the Court in the *I.C.C.* case held that a case or controversy did exist,

⁴*Douds v. Local 1250*, 170 F.2d 695, 698 (2d Cir. 1948); *Maryland Cas. Co. v. Tindall*, 117 F.2d 905, 908, (8th Cir. 1941).

⁵*Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662 (5th Cir. 1967). *United States Galv. & Plating Equip. Corp. v. Hanson-Van Winkle-Munning Co.*, 104 F.2d 856 (4th Cir. 1939).

⁶Regarding the effect of the presence of intervenors, see note 20 *infra*.

⁷See *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 480 (1952) (Jackson, J., dissenting). Justice Jackson denounced the “recent instances in which part of the government appears before [the federal judiciary] fighting another part—usually a wholly executive controlled agency attacking one of the independent administrative agencies.” 343 U.S. at 482-83

⁸337 U.S. 426 (1949)

the specific issue decided in that case is distinguishable from that of the case at bar.

The *I.C.C.* case did not involve the United States *qua* United States, but rather in its essentially proprietary capacity as a shipper of goods.⁹ The Court acknowledged that one cannot ordinarily sue himself because of the requirement of a justiciable controversy, but went on to point out that "courts must always look behind the names that symbolize the parties to determine whether a justiciable case or controversy is presented."¹⁰

"While this case is *United States v. United States et al.*,...the basic question is whether the railroads have illegally extracted sums of money from the United States... [T]he Government is not less entitled *than any other shipper* to invoke...judicial protection."¹¹ (emphasis supplied)

Thus, it is clear that the *I.C.C.* case did not give carte blanche to the United States to sue its administrative agencies. Rather, it established the proposition that, under proper—narrowly defined—circumstances, a case or controversy can exist in such a suit.¹²

This interpretation of the *I.C.C.* case was taken in the more recent case of *United States v. Easement and Right of Way, Etc.*,¹³ in which the TVA (treated by the court as a government agency) sought condemnation of land in which the Farmer's Home Adminis-

⁹*Id.* at 428.

¹⁰*Id.* at 430.

¹¹*Id.*

¹²See also, *United States v. I.C.C.*, 142 F.Supp. 741 (D.D.C. 1955)

¹³204 F.Supp. 837 (E.D. Tenn. 1962).

tration (FHA) held a security interest. The court held that the Federal Courts cannot decide disputes among federal agencies: "it appears to the Court that there could not be any issue between the TVA and the FHA, both being the United States, which this Court could . . . adjudicate."¹⁴

The Court distinguished the *I.C.C.* case on the ground that it had involved the United States "in its capacity as a shipper,"¹⁵ claiming reparations from the railroads, and those two entities were, therefore, the real parties in interest.¹⁶ It characterized the *I.C.C.* case as standing for no more than the proposition that when legitimate adversaries *do* in fact exist, nominal identity of the parties will not destroy jurisdiction.¹⁷

The precise issue presented by this case does not appear to have been decided by any federal court.¹⁸ It would appear, therefore,

¹⁴*Id.* at 839. See also *S & E Contractors v. United States*, 433 F.2d 1373, 1381 (Ct.Cl. 1970) (Skelton, J., dissenting).

¹⁵*Id.* at 840

¹⁶*Id.*

¹⁷*Id.* See also *Belt v. Toomey*, 95 U.S.App.D.C. 39, 218 F.2d 850 (D.C. Cir. 1954).

¹⁸A similar issue was presented in two cases involving a suit for money damages in which the real parties in interest were found to be the United States, both as to plaintiff and defendant. In these cases, the court held that the United States was, in effect, suing itself and that, therefore, there was no case or controversy. *Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311 (2d Cir.), cert. denied 326 U.S. 746 (1945); *Defense Supplies Corp. v. American-Hawaiian S.S. Corp.*, 64 F.Supp. 459 (S.D. N.Y. 1945).

Although not directly in point these cases do stand for the general proposition that one segment of the United States Government cannot possess interests adverse to another segment of the United States Government, of such nature as will give rise to a case or controversy within the meaning of the Constitution.

that this will be a case of first impression. Concisely stated, the issue presented is: whether a case in which the United States alone, in its governmental (non-proprietary) capacity,¹⁹ is cast in opposition to the United States and an administrative agency thereof,²⁰ there exists a justiciable case or controversy which can be decided by the Federal Judiciary.²¹

¹⁹The Justice Department raised no issue before the FMC regarding its alleged capacity as a shipper in this case, and should, therefore, be precluded from raising that issue here. See note 23 *infra*.

²⁰The United States is the only petitioner in this matter. It is the only party before this Court seeking to test the validity of the FMC ruling. Since the filing of the United States petition for review, two shipping concerns, Sea-Land Service, Inc., and American Export Isbrandtsen Lines, Inc., have been granted permission to intervene as party respondents.

The United States, however, asserts no complaint directly against intervenors in this matter; nor are they directly involved in the United States complaint against the FMC. The presence of intervenors as permissive party respondents in this matter, therefore, can in no way alter the basic character of the proceeding: a suit by the United States against the United States and the FMC, asserting the invalidity of a ruling by the FMC, an agency of the United States. Intervenor submits that there can be no case or controversy under such circumstances, and that its presence here, asserting the absence of a case or controversy, cannot create one.

²¹Not only does the United States seek relief against itself in this matter, but significantly, the gravamen of its complaint lies in the denial, by one of its agencies, of its demand for a hearing prior to making an administrative ruling. Thus, the issue at bar may be further qualified: whether the denial of a hearing to the United States by an agency of the United States creates a justiciable controversy of which this Court may take cognizance.

The right to be heard before an agency is one aspect of administrative Due Process which rests ultimately on the Fifth Amendment to the Constitution. A tacet premise of the United States in this matter, therefore, is that it has been denied Due Process of Law by the failure of one of its own agencies to grant it a hearing. To state the proposition would seem to refute it. Moreover, the Supreme Court has held that "States of the Union" cannot assert the Fifth

The Justice Department cites several cases in its brief, none of which are directly in point. Each of these cases is readily distinguishable on one or more of the following bases:²²

- 1) The United States was involved in its proprietary capacity;²³

Amendment Due Process clause. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). Application of this rationale to the United States itself would seem an a fortiori case. cf. *United States v. City of Jackson*, 318 F.2d 1, 8 (5th Cir. 1963).

Intervenor submits that the failure of an agency of the United States to grant a hearing to the United States does not give rise to a justiciable case or controversy within the meaning of the Constitution.

²²The following cases, in addition to those cited by the Justice Department, all suffer from similar deficiencies in that the issue of case or controversy was never raised nor was it considered by the Court. In two of these cases, there were private plaintiffs in addition to the United States. *Secretary of Ag. v. United States*, 350 U.S. 162 (1956); *United States ex rel. Chapman v. F.P.C.* 345 U.S. 153 (1953); *Benson v. United States*, 175 F.Supp. 264 (D.D.C. 1959). In *Luckenbach S.S. Co. v. United States*, the Court simply ignored the jurisdictional issue and chose to dismiss on the merits instead. 315 F.2d 598, 602 (2d Cir. 1963).

²³See discussion of *United States v. I.C.C.*, *supra*.

The Justice Department represented at all times to the FMC that its involvement in this case was strictly pursuant to its responsibility to enforce the anti-trust laws. See *Petition of Department of Justice*, October 15, 1970 at 1-2 (J.A. at 7); *Petition of Department of Justice*, February 12, 1971 (J.A. at 51). At no time has the Justice Department raised before the FMC, any issue of its capacity as a shipper of goods in this case.

Not having raised the issue before the FMC, the Justice Department should be precluded from asserting it, for the first time, on judicial review. See e.g., *Quick v. Martin*, 130 U.S. App.D.C. 83, 397 F.2d 644, 647 (D.C. Cir. 1968); *California Interstate Tel. Co. v. F.C.C.*, 117 U.S. App.D.C. 255, 328 F.2d 556, 559 (D.C. Cir. 1964); *Hennesey v. S.E.C.*, 285 F.2d 511, 514 (3d Cir. 1961).

2) The issue of case or controversy was not raised nor was it considered by the Court;²⁴

3) Other plaintiffs were parties to the suit.²⁵

Although, as noted previously, no case has considered the precise question presented here, intervenor submits that the proper result lies in the approach taken by the Court in the *Easement and Right of Way, Etc.* case: "There could not be any issue between [two agencies of the federal government], both being the United States, which this Court could . . . adjudicate."²⁶ This result is consistent with the universally acknowledged requirement of "real and substantial" controversy between parties with legitimate adverse interests.²⁷

In accordance with the statutory scheme adopted by Congress, the FMC is vested with the responsibility of approving or disapproving agreements, such as No. 9899, which fall within its sphere of special expertise.²⁸ The United States is made a compulsory respond-

²⁴The Justice Department's treatment of the case or controversy issue in its brief is confused by its failure to distinguish between the issues of case or controversy—as presented here—and standing. Thus, we see the citation of *Udall v. F.P.C.*, a case which dealt with the standing issue *only*, as representing an extension of the case or controversy disposition made by the Supreme Court in *United States v. I.C.C.*

²⁵In such cases, the government's ability to sue itself becomes moot, because a valid case or controversy exists independent of the presence of the government as a plaintiff. The government's presence, therefore can effectively be ignored with regard to the case or controversy issue: a case or controversy *does* exist, and its joinder as a plaintiff cannot destroy the same. This situation, contrasts sharply with the case at bar in which the *only* petitioner is the United States.

²⁶204 F.Supp. at 839.

²⁷See notes 3-5, *supra*.

²⁸Shipping Act of 1916, §15, 46 U.S.C. §814 (1964).

ent in proceedings for judicial review of any such action taken by the FMC.²⁹ Under such a system, the ultimate safeguard against unfair or improper action by the FMC must lie in the omnipresent ability of private parties to challenge adverse decisions in just such proceedings as the Justice Department pursues here. The public are the proper parties to assert the impropriety of any decision. Clearly, the United States is free, under these circumstances, to support the private petitioner if it believes him to be correct in the law or facts. What the United States may not do, however, is create a case or controversy where none exists by bringing such an action as the one at bar in the absence of a private petitioner alleging in his own right, the impropriety of an FMC decision.

II. NO HEARING BEFORE THE FMC WAS REQUIRED BECAUSE THE IMPACT OF THE AGREEMENT ON MARITIME COMMERCE IS *DE MINIMIS*.

Agreement No. 9899, as approved by the Commission, is a cooperative working arrangement among seven common carriers by water in the foreign commerce of the United States. (See Agreement No. 9899, J.A. at 1, 3) Each of the operators (four of which are United States companies and three of which are non-United States companies) carry containers in containerhips between United States Atlantic ports on the one hand and Atlantic ports of Continental Europe, Baltic and Scandinavian ports, and ports of the United Kingdom and Eire on the other hand.

The *res* of the cooperative working arrangement is the permissive—but not mandatory—exchange and development of information among the parties relating to:

“(1) Cost of service, rates, rules and tariffs relating to traffic in intermodal containers;

²⁹28 U.S.C. § 2344 (Supp. V, 1970).

"(2) Practices in connection with the receipt and delivery of traffic in containers, including interchange with connecting land carriers or other transportation of intermodal containers between inland points and ports of loading or discharge from containerships; and

"(3) The regularity of traffic flow; the seasonal and other fluctuation of traffic flows, and related data bearing on the level and frequency of service required by shippers."

(Agreement No. 9899, J.A. at 1)

The Agreement further provides that the purpose of the exchange is to determine whether uniform or agreed procedures can be formulated, and that any agreement embodying such agreed to procedures will be filed with the Commission, and will not be carried out until approved by the Commission. (Agreement No. 9899, J.A. at 1, 2)

In restructuring the agreement—and approving it without hearing as so restructured—the Commission provided that no information exchange or discussion relating to operations in respect of Mediterranean port service from and to the United States Atlantic Coast take place. (Commission Order, J.A. at 21, 25-26) Moreover, the Commission limited the time period of approval to three months, with the right accorded to the parties to seek renewal for an additional three months.³⁰ Finally, the Commission provided that each and every exchange, discussion or agreement transacted thereunder be reported in writing to the Commission within 10 days of its occurrence. (Commission Order, J.A. at 21, 25) This condition was subsequently clarified to ensure that the actual documents distributed or prepared were likewise filed with the Commission. (Supplemental Order, J.A. at 42, 43)

³⁰Commission Order, J.A. at 21, 25. The parties have since taken advantage of that right and are seeking extension for an additional three months.

In these circumstances, we submit that the impact of Agreement No. 9899 on commerce is *de minimis* within the meaning of this court's use of that phrase in *Marine Space Enclosures v. Federal Maritime Commission*, 137 U.S. App.D.C. 9, 420 F.2d 577.

Marine Space Enclosures involved agreements for construction and maintenance of passenger terminal facilities, and use thereof as between carriers and the Port of New York Authority. In characterizing the operative effects of the agreements, the court stated:

"The agreements thus amount to a significant and perhaps total barrier to entry for the next seventy years."
Id. at 584.

In that context, the court found that the all inclusive restraint for such a duration raised serious questions not only in terms of general antitrust doctrine but also under the Commission's own rulings considering the impact of restraint in the maritime industry. While holding that the Commission erred in failing to provide the hearing which had been sought by the private citizen/potential competitor, the court observed that the hearing requirements under Section 15 might not be all inclusive. In that regard, the court stated:

"There may be an implied exception to the literal command of Section 15 when the Commission has made appropriate determination that certain agreements are of purely routine nature or have an impact on commerce that the Commission finds is *de minimis*."
[Citation omitted]. *Id.*

The question thus becomes: can Agreement No. 9899 fairly be described as one that is either routine or *de minimis* under the rule of *Marine Space Enclosures*?

In our view, the Agreement cannot be fairly said to be routine. It seems to us that, for an agreement to be routine, it would have to be that kind of reoccurring agreement which, through rule mak-

ing³¹ or an established pattern or process would have a common denominator with a pre-established type of agreement.

Can, then, the Agreement be fairly described as *de minimis*?

At the outset, it seems clear to us that the magic words "*de minimis*" need not be used in the Commission's order of approval for an agreement to be in fact *de minimis*. Moreover, we think it clear that the finding by the Commission that nothing in the Agreement authorizes the parties to implement any program until such a plan is filed with and approved by the Commission, coupled with the finding that the conditions attached to approval "...minimize [the] risk..." of anti-competitive effects of the exchange of information alone constitute an implicit finding of *de minimis*.

The numerous cases which have applied or explained the expressions *de minimis* or *de minimis non curat lex*, are of little factual comparative significance here. They are demonstrative, however, of the principle that the standard to be applied is an objective rather than a subjective one. Thus, where the import of this maxim has been considered in the context of federal regulation of interstate commerce, it has been made clear that the fact that only a small percentage of one's business is in interstate commerce will not preclude federal control where the absolute amount of business represented by that percentage is not "*de minimis*" on an objective basis.³²

Thus, the subjective premises of petitioner's contention that the *de minimis* principle does not here apply are misconceived. That is, the number and size of the signatories to the agreement are not relevant in determining whether or not the agreement itself is *de minimis*

³¹See 46 U.S.C. §833a

³²See *N.L.R.B. v. Cowell Portland Cement Co.*, 108 F.2d 198, 201 (9th Cir. 1939).

in its impact on maritime commerce. Nor is the importance to the parties of obtaining approval thereof, so as to immunize the parties from attack under the antitrust laws. Nor is the fact that the agreement filed is "...totally unprecedented..." in its form or substance. Finally, the fact that the things done under the agreement might lead to a substantive agreement having substantial impact on maritime commerce³³ is immaterial. In summary, none of the above allegations set forth by petitioner is of any significance in applying the objective test articulated in *Marine Space Enclosures*: whether this Agreement, in and of itself, has a significant impact on maritime commerce.

In any event, we have searched in vain for any allegation by petitioner that the implementation of Agreement No. 9899 to its desired result—i.e., the hammering out and filing of a substantive agreement—will have any impact on commerce. What petitioner fears are abuses which might be perpetrated by the parties under Agreement No. 9899, i.e., indirect implementation of a proposed agreement through conscious parallelism.

Our response to that is two-fold. First, the Commission has, in its expert judgment, structured the approval of the agreement with safeguards which it believes have minimized this potential effect. These safeguards, coupled with the barrage of powers in the Com-

³³For the good or for the bad; which in any event will be determined by the Commission after notice and hearing pursuant to Section 15. If the Commission, in its expertise, finds that the effectuation of the substantive agreement would not be in the public interest or would be to the detriment of commerce, then the Commission would disapprove the agreement and it would never be effectuated. If the substantive agreement were approved in the face of allegations at hearing that the agreement did not pass muster under Section 15, then any person alleging adverse effect or grievance would have the right to seek review in this or another circuit court.

mission's arsenal under the Shipping Act of 1916³⁴ clearly could find and meet any adverse manifestation of conscious parallelism. Secondly, the nexus between the sanction here sought and the avoidance of abuse through conscious parallelism is illusory since the gravamen of petitioner's complaint is the denial of a classical hearing including discovery. Indeed, petitioner has asserted that, had it been accorded such a hearing, it would have sought precisely the type of information which Agreement No. 9899 provides may be exchanged and developed as between the parties. The information developed through discovery could conceivably be more extensive than under Agreement No. 9899 itself, in that the agreement provides that no party is obligated to exchange the information, while discovery procedures would allow no such freedom of choice.

In conclusion, we would point to one more factor which demonstrates that Agreement No. 9899 is, as a practical matter, *de minimis* in its impact on commerce. That is, not one member of the shipping public—no shipper, no consignee, no freight forwarder, no customs broker, nor any associations thereof—so much as wrote the Commission a letter after notice of this Agreement in the *FEDERAL REGISTER*. Only three non-conference operators in the relevant trades and petitioner registered any form of dissatisfaction over Agreement No. 9899 with the Commission. Only petitioner was concerned enough over the Commission approval without hear-

³⁴The Commission is empowered to, among others: investigate and remedy discriminatory acts of regulated carriers; enforce non-discriminatory rates, regulations, and practices; pass on the reasonableness of carriers' rates; approve or disapprove dual rate contracts; approve or disapprove agreements bearing in any way on competition; require periodic or special reports of any matter pertaining to a shipper's business; investigate complaints of violations of the Act and assess reparations therefore; and compel the attendance of witnesses at its hearings by issuance of subpoena. See Shipping Act of 1916, 46 U.S.C. §§ 813; 816; 817; 813a; 814; 820; 821; 826 respectively.

ing to seek judicial review of the agency's action. For the reasons stated in Part I hereof, we assert that no case or controversy has been created by petitioner's attempt to so seek review.

CONCLUSION

For the reasons stated, we urge that petitioner's petition to review be dismissed for failure to raise a justiciable case or controversy. Alternatively, we urge that the Commission's approval of Agreement No. 9899 be affirmed on the basis that the impact of the Agreement on maritime commerce is *de minimis* and thus not subject to the requirement of a hearing under this court's decision in *Marine Space Enclosures*.

Respectfully submitted,

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May 3, 1971

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused two copies of the foregoing Reply Brief of Intervenor Sea-Land Service, Inc., to be served upon the Department of Justice; the United States Attorney for the District of Columbia, the Federal Maritime Commission, and American Export Isbrandtsen Lines, Inc., either by first-class mail or by hand delivery to the office of the attorneys of record for the given parties.

Edward M. Shea

May 3, 1971

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24895

UNITED STATES OF AMERICA,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

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FILED APR 30 1971

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Washington, D.C.
April 30, 1971

QUESTIONS PRESENTED

1. Whether The Federal Maritime Commission is foreclosed from approving an agreement without holding evidentiary hearings where its action was based upon known unstable situations in a trade area.
2. Whether the Federal Maritime Commission properly approved the agreement in question without holding evidentiary hearings where petitioner raises no substantial issues of material fact and where proponents had demonstrated a serious transportation need for the agreements.
3. Whether the Attorney General, acting on behalf of the United States, has standing to litigate the questions presented by its Petition in this Court.

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Counterstatement of the Case

This is an action brought by the Attorney General, acting on behalf of the United States (Department of Justice) to review an order of the Federal Maritime Commission (Commission), served on November 24, 1970. The assailed order (J.A. 21) approved Agreement No. 9899 pursuant to section 15, Shipping Act, 1916, 46 U.S.C. §814 (J.B., Statutory Appendix A 1).^{1/}

The Commission proceeding had its genesis on September 17, 1970, in a letter to the Commission transmitting the agreement for approval (J.A. 17). The letter requested that the Commission approve the agreement under section 15 of the Act because of an urgent necessity to restore order and stability to the North Atlantic trade.

The parties to Agreement No. 9899 are American Export Isbrandtsen Lines, Inc., Dart Containerline Incorporated, Atlantic Container Lines, Ltd., Hapag-Lloyd Aktiengesellschaft, Sea-Land Service, Inc., Seatrain Lines, Inc., and United States Lines, Inc., which are the major containership operators in the North Atlantic. The agreement, as submitted, covered the trades from, to or between U.S. Atlantic ports and Atlantic ports of Continental Europe, Baltic and Scandinavian ports, Mediterranean ports and ports of the United Kingdom and Eire.

^{1/} Petitioner's brief will at times be abbreviated as indicated in parenthesis above. Record references will be in accordance with the joint appendix filed by petitioners but not employed in its brief of March 31, 1971.

Under Agreement No. 9899 the parties agree to exchange information and to cooperate in developing information relating to (1) cost of service, rates, rules and tariffs relating to traffic intermodal containers; (2) practices in connection with the receipt and delivery of traffic in containers, including interchange with connecting land carriers or other transportation of intermodal containers between inland points and ports of loading or discharge from container ships; and (3) the regularity of traffic flow; the seasonal and other fluctuation of traffic flows, and related data bearing on the level and frequency of service required by shippers.

The stated reasons for exchanging this information were to determine whether uniform or agreed container rules, practices and procedure are needed and whether or not they can be agreed upon. The parties also agree to consult with exporters and importers, including buyers and sellers abroad, for the purpose of obtaining and considering their views and comments in this respect.

The agreement further provides (1) that it does not authorize the parties to carry out any arrangement which may be reached except upon prior filing with and approval by the Commission or any other concerned governmental authority; (2) that it does not obligate any carrier to exchange the described information or limit any carrier in making changes in its own rates, rules and practices; and (3) that any common carrier offering container service in the same trades may join the agreement.

Notice of the filing of the agreement was given the public in the Federal Register of September 25, 1970, 35 F.R. 14963. Comments were invited. In response to publication in the Federal Register, the Department of Justice "as an interested party"^{2/} petitioned the Commission for a hearing on the agreement (J.A. 7). Two lines, Meyer and Finnlines, who operate in most of the trades covered by the agreement, submitted comments (J.A. 4) requesting that the proposed agreement be added as an issue to a Commission proceeding already in progress involving the establishment of a "Transatlantic Freight Conference" (known as The Super Conference or the Container Conference). That proceeding, Docket No. 69-58, covering Agreement No. 9813, which was instituted by the Commission in December 1969, and involving numerous parties, is still in the discovery stage with the Department of Justice currently scheduled to depose certain witnesses. The only other comment filed with the Commission was received from the Outboard Marine Corporation, a marine engineering firm located in Waukegan, Illinois, whose opposition was largely directed to the "Super Conference" proceeding (J.A. 15). No other governmental agency, carriers or shippers filed protests.

^{2/} The Department alleged that it is ". . . charged by Congress with the duty of protecting the public interest in a competitive economy. The United States has a direct and substantial interest in preserving competition as a means of obtaining satisfactory shipping services at reasonable rates, preventing unfairness and discrimination against U.S. shippers, exporters, importers and ports, fostering the maximum growth and development of United States commerce and preventing detrimental effects upon United States commerce." (J.A. 7, 8)

In its protest the Department of Justice opposed approval and requested a hearing on the grounds that the agreement may be contrary to the public interest because (1) it may "eliminate competitive incentives with respect to pricing, service and technological innovations"; (2) it is too vague for the Commission "to make the public interest determination required by section 15"; (3) there is a close but undefined nexus between this agreement and Agreement No. 9813, therefore any information exchange of this type should be authorized only within the context of Docket 69-58 and made available to all parties of record in that proceeding (J.A. 10-12).

In response to the protests and requests for hearing, proponents urged approval without a hearing on the grounds that (1) approval of Agreement No. 9899 will not "eliminate competitive incentives" because any further agreement reached under this agreement must be submitted to and approved by the Commission before it can be put into effect; (2) the foreign flag parties consider that they have a right to discuss any matters covered by this agreement without section 15 approval and only signed it in a spirit of cooperation (ergo, if not approved, they will proceed without it minus the American flag parties); (3) the information to be obtained from the foreign flag parties could only be obtained through voluntary cooperation such as this agreement; and (4) consolidation with a conference agreement (9813) which may require months of hearings and legal pleadings can serve no useful purpose (J.A. 16-20).

The Commission's consideration of Agreement No. 9899 resulted in its approval without an evidentiary hearing on November 24, 1970, but not without significant modifications. In its order of approval, the Commission concluded that an evidentiary hearing was not needed since no action in the implementation of any arrangement reached pursuant to the agreement could be taken without being submitted and approved. The Commission noted that nothing more than permission to discuss and exchange data was being sought, that this exchange and development of information is on a voluntary and not mandatory basis and that in light of acute problems involving overtonnaging, instability and malpractices in the trade, the agreement seeks to solve these transportation problems. While noting that the exchange of information alone might involve a risk of anticompetitive conduct incompatible with the criteria and requirements of section 15, the Commission imposed strict reporting and time structures to minimize the risk.

First, the Commission eliminated from the coverage of the agreement discussions relating to the trade from U.S. Atlantic ports to ports in the Mediterranean on the ground it did not appear to the Commission that the same acute problems existed in the Mediterranean trade. Secondly, the Commission limited its approval to a three-month period, and, finally, the Commission required a report from the parties on each and every exchange, discussion or agreement transacted by the parties. In this way, the Commission sought to minimize the risk of injury to the "public interest" asserted by the Department of Justice.

On December 1, 1970, the Department of Justice petitioned the Commission for a stay of the order (J.A. 29-32), which the Commission denied on December 4, 1970. The Commission noted that aside from rearguing its prior position, the Department of Justice claimed that a stay was necessary to prevent irreparable alterations of the status quo while they, "Because of the important public policy questions presented by the Commission's approval without a hearing . . . consider[s] whether it should undertake action to secure further review of the Commission's Order." The Commission considered that an insufficient cause for staying its approval and denied the petition (J.A. 33).

On December 11, 1970, the Department of Justice filed with this Court a petition for review, a motion for stay pending review and application for a temporary stay of the Commission's approval pending disposition of motion for stay pending review. A response was filed by the Commission, and after oral argument before a panel consisting of Judge Fahy and Judge Robb the motion and application for a stay were denied on December 30, 1970. Judge McGowan, designated as a member of the panel, did not participate in the order of the Court. The motion and application were denied upon condition that the Commission order the parties to the agreement to supply the Commission all information exchanged pursuant to agreement. Immediately thereafter, the Commission complied with the Court's condition and ordered all parties to file with the Commission copies of reports of "each and every exchange, discussion or agreement transacted" (J.A. 42-43).

On January 28, 1970, the parties filed an application to extend the agreement since the approval of the agreement was limited to a period of three months with the right to seek renewal for an additional consecutive three-month period (J.A. 45).

They requested extension on the grounds that (1) much of the initial three months was taken up with the litigation; (2) serious discussion was getting underway; (3) the transportation needs justifying initial approval continue to exist; (4) tentative agreements have been proposed; and (5) further discussions were required in order to obtain solutions (J.A. 45-48).

Notice of the filing of the application for extension was published in the Federal Register of February 2, 1971, 36 F.R. 1550. In response, the Department of Justice filed a protest requesting that the application for extension be set down for a hearing prior to approval for the same reasons as cited in its original petition of October 15, 1970, on the grounds that (1) there has been no change in Agreement No. 9899 since the original approval and (2) the proponent lines still have not shown why any specific information exchange or cooperative development of information is necessary to reach agreement on a proposed solution of the alleged problems of overtonnaging, instability and malpractices in the North Atlantic trades (J.A. 51-54).

The member lines signatory to the agreement answered Justice's request by noting that (1) the Department of Justice's request does not provide any clear and concise statement of specific matters on which it wished to adduce evidence and did not describe any unfairness, discrimination, violation of the Act or detriment to commerce which would result from the three-month extension; (2) that the Department of Justice has advanced no new matter requiring a hearing and offered no argument not already rejected by the Commission or denied by the D.C. Court of Appeals; and (3) that it ignored statements in the request for extension that compelling reasons exist for granting the request (J.A. 45-48).

No other comment or protest was received from any other governmental agencies, carriers or shippers other than the Department of Justice. Neither Meyer Lines, Finnliness nor Outboard Marine Corporation, who filed comments on the original approval of the agreement, filed any opposition to the requested extension of the agreement.

The Commission, on the record thus made, and after considering the conditions in the trade, the effects thus far of the agreement and the Department of Justice's comments and replies thereto, concluded that an evidentiary hearing was not needed on the application to extend approval of Agreement No. 9899. The Commission noted that an attempt has been made by the parties to reach solutions in the trade; that reports have been filed explaining in detail each exchange of information and discussion; that the parties have proposed and are considering a

pooling agreement as a possible solution to the existing transportation problems; and that further discussions and exchanges appeared to be necessary to bring to fruition the intent of the agreement and the Commission's reasons for initially approving it. The Commission's approval of the time extension of agreement also carried a three-month time limitation and reporting requirement conforming to this Court's Order of December 30, 1970 (J.A. 55-58).

The Department of Justice, alone, here seeks judicial review of the Commission's action.

Summary of Argument

The Commission, not the Department of Justice, is charged by the Congress with the approval of agreements among common carriers by water operating in the foreign commerce of the United States. In discharging this responsibility the Commission seeks to insure that in approving agreements the concerted activity authorized does not invade the prohibitions of the antitrust laws any more than is necessary to achieve the regulatory purposes of the Shipping Act, 1916. Thus, among governmental agencies, it is the Commission which speaks with final authority on Shipping Act matters.

The Commission's decisions are, of course, subject to review in the federal courts by any party aggrieved by those decisions, but the party seeking review must demonstrate a grievance based on something more than an abstract prediction of potential future harm which is in turn based on a misapplication of antitrust philosophies to matters essentially regulatory. Here, the Department's grievance arises from its self-assumed role of "guardian" of the public's interest in insuring that anticompetitive activity approved by the Commission does not invade the prohibitions of the antitrust laws any more than is necessary. The Department's assumption of this role is contrary to the express intention of Congress and the present action constitutes nothing more than an attempt by the Department to substitute its notions of what is good for the waterborne foreign commerce of the United States for those of the Commission. The asserted "interest" of the Department of Justice is insufficient to maintain this proceeding, and it should be dismissed.

In approving Agreement No. 9899, the Commission following the guidelines laid down by this Court in Marine Space Enclosures v. Federal Maritime Commission, 137 U.S. App. D.C. 9, 420 F.2d 577 (1969), determined that the applicants for approval of that agreement had satisfied the burden of demonstrating the need for the anticompetitive restraints embodied in the agreement and declined to grant the evidentiary hearing sought by the Department of Justice. Were the Court to adopt the position urged by the Department, we respectfully submit that the Commission could never demonstrate that an agreement should be approved over a protest, and the criteria of Marine Space would be rendered meaningless.

The exploratory nature of the agreement, when taken with the reporting requirements and time limits imposed by the Commission, afford ample protection to the public. The evidentiary hearing desired by the Department would have been inordinantly time-consuming, expensive and burdensome and would in the last analysis have produced little that the Commission did not already possess. This Court should affirm the Commission's order.

Argument

I. THE COMMISSION IS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING BEFORE APPROVING ALL SECTION 15 AGREEMENTS

After weighing the potential inroads into the antitrust policies of this country against the regulatory benefits to be gained, the Commission approved Agreement No. 9899 subject to certain restrictions. In short, the Commission discharged its responsibilities under the Shipping Act.

The Department of Justice would now have this Court conclude that the approval of Agreement No. 9899 was improper because the Commission did not conduct a full-blown evidentiary hearing on the significant anti-trust questions raised in the Department's protest. Relying upon two recent decisions of this Court, Marine Space Enclosures v. Federal Maritime Commission, 137 U.S. App. D.C. 9, 420 F.2d 577 (1969) and City of Portland v. Federal Maritime Commission, ___ U.S. App. D.C. ___, 433 F.2d 502 (1970), the Department of Justice argues that these cases "make it unmistakably clear" that a hearing should have been held prior to the approval of Agreement No. 9899. We submit that at the heart of the difficulties the Department of Justice has with the Commission's approval of Agreement No. 9899 is its insistence on viewing what is basically a shipping and regulatory problem through purely antitrust lenses. This arbitrarily narrow view forces the Department to ignore the primarily important consideration behind the Commission's refusal to hold an evidentiary hearing—the need for and the benefits to be gained from approval outweighed any of the alleged inroads into antitrust policy even if all the antitrust considerations asserted by the Department were deemed true and relevant.

Agreement No. 9899 was designed to allow the parties to it to explore the possibility of establishing uniform rates, procedures and practices in the hope of restoring order and stability to the chaotic North Atlantic trades. The primary device for exploration was the exchange of information which, if exchanged or developed,^{3/} was designed to afford the parties to the agreement a basis for determining whether "uniform or agreed rules, practices and procedures" for the conduct of trade in the North Atlantic. Such tentatively agreed to rules, practices and procedures are not, however, to be carried out until they, and any agreement embodying them, are filed with and approved by the "Federal Maritime Commission and/or any other concerned governmental authority".

Finally, membership in the agreement was open to "any common carrier offering container service" in trades covered by the agreement.

The avowed purpose of the parties, the very nature of the agreement and the restrictions and conditions imposed by the Commission make Agreement No. 9899 stand in stark contrast to the problems presented to this Court in Marine Space and City of Portland, supra. In Marine Space, this Court held that the Commission acted improperly when it failed to hold a hearing before approving two agreements which called for the construction and maintenance of consolidated marine passenger terminal facilities in the port of New York City, and which, as a practical matter,

^{3/} The agreement itself provides: "Nothing herein is to be construed as obligating any carrier to exchange the information described above, or as limiting the right of any carrier to continue or to make changes in its present rates, rules, and practices."

excluded all other terminals in the area for 23 years (3 years for an interim terminal and 20 years covering the authorization of bond issue for financing the project). This Court, emphasizing the "nature and gravity of the issues raised by protestant", expressed the view that a pre-approval hearing could only be avoided: (1) "when the Commission has made appropriate determination that certain agreements are of purely routine nature or (2) have an impact on commerce that the Commission finds de minimus",^{4/} (3) "if no protest is filed",^{5/} (4) if there are no issues of "substance" or "obvious gravity",^{6/} or (5) when "an applicant for approval of a restrictive agreement [satisfies] the burden of demonstrating the need for anticompetitive restraints"^{7/}

It hardly seems necessary to say that the Commission is acutely mindful of this Court's conclusions in Marine Space and City of Portland, supra, wherein this Court pointed out (433 F.2d 503):

Generally, an administrative approval without the benefit of a hearing is to be avoided, particularly where, as here, what is involved is an approval under Section 15 of the Shipping Act and the case has antitrust ramifications. ^{8/}

^{4/} Marine Space Enclosures, supra, at 584.

^{5/} Id. at 587, n. 27.

^{6/} Id.

^{7/} Id. at 583.

^{8/} There is, of course, no requirement that an agency, in approving an agreement and exempting its operation from the antitrust laws, engage in "sophisticated antitrust" analysis. It need only demonstrate that it perceives the danger posed by a proposed agreement because of its antitrust implications. The agency's approval must be affirmed or reversed on the basis of substantial evidence (or the lack thereof) to support the agency's conclusion under its own statutory standards. Florida East Coast Railway Co. v. United States, 259 F.Supp. 993, 997, 999-1002 (M.D. Fla. 1966).

But the compelling fact here is that the applicants have satisfied "the burden of demonstrating the need for anticompetitive restraints."

While Marine Space involved the consequences of a twenty-year "complete market foreclosure and the vested interests and relationships that will inevitably develop",^{9/} the present agreement provides merely for the exchange of information under agency scrutiny. The City of Portland case similarly was based on the petitioner's claim that an agreement not to service the Port of Portland existed and upon the contention that the agreement approved by the Commission had effectively foreclosed Portland as a port of call. In both cases, the parties were free to begin actual physical operations of a significantly restrictive nature, while here such possibilities or probabilities are nonexistent.

Notwithstanding these considerations, the Department of Justice would equate both the language and factual presentations of both cases with the Commission handling of the instant agreement. To the Department of Justice ". . . the whole point of Marine Space was that the applicant [for approval] must make that demonstration [need outweighs anticompetitive effect] at a hearing or through some evidentiary procedure that in substance accomplishes the fact-finding purposes of a hearing." (J.B. 39).

^{9/} 420 F.2d 577, 589.

We respectfully submit that the Department's present position suffers from a number of disabilities. In the first place we cannot overcome the feeling that the Department has reacted rather too strongly to the rejection of its posture in the Marine Space case. From joining the Commission in the contention that no hearing was necessary in Marine Space, they now would appear to have gone over to the view that a hearing is always necessary without regard to the circumstances prompting agreement in a trade, the severity of the anticompetitive conduct for which sanction is sought or the nature of the protest against approval. We are driven to this characterization of the Department's position by its insistence on equating the agreement before this Court now with the one before it in Marine Space. Agreement No. 9899 is not the lease which was before the Court in Marine Space and nothing more clearly demonstrates this than the protest and arguments of the Department of Justice itself. Here the Department must content itself with examples of harm which results from mere exchanges of information in antitrust cases because that is what Agreement No. 9899 is—an agreement for the development and exchange of information under Commission scrutiny. It is not an exclusive lease for decades which could have the effect of excluding all others from the terminal business as in Marine Space. We simply do not believe the sample preapproval requirements apply here as they did in that case. Yet another disability is involved in the Department's many examples of the antitrust consequences which flow from exchanges of information between competitors. The trouble is that the Department relies solely on antitrust consequences—consequences which result from

secret conspiracies between otherwise competitive and unregulated businesses designed solely for the circumvention of the antitrust laws.

These situations can and must be contrasted with the matter at issue here. While there can rarely if ever be a legitimate end under the antitrust laws for conspiracies to exchange competitive business information, quite the opposite is true under the Shipping Act. Section 15 of that Act (46 U.S.C. 814) expressly provides for anticompetitive agreements which, in most cases, would clearly violate the antitrust laws but for that section; and as already mentioned, it is the Commission, not the Department of Justice, which is the guardian of the public interest when anticompetitive agreements are approved under that section. Thus, Agreement No. 9899, as distinguished from a conspiracy under the antitrust laws looks, by its very terms, to a legitimate and recognized end under section 15 of the Shipping Act—the establishment, if and where possible, of uniform practices and procedures for the carriage of intermodal cargoes.

A necessary first step in every road leading to agreements under section 15 is discussion of the mutual problems of the prospective parties to an agreement. Meaningful discussions must, of course, be based upon exchanges of information to determine what if any areas there are in which agreement can be reached—discussions of the very kind involved here. But if these discussions may not be held until there is a full-blown evidentiary hearing to determine whether or not they are in the "public interest" (that is, whether or not they coincide with the Department's

idea of what is consonant with antitrust policy), it is probable that they may never be held.

What the Department of Justice is urging is in reality a two-tiered system of hearings which would inevitably result in doubly-delayed action by the Commission, and more often than not this delay would come in those cases where speed, but not haste, is of crucial importance.^{10/} First, the Commission must conduct a hearing on an agreement which merely provides the parties an opportunity to discuss the possibility of an agreement, and then, assuming an agreement is reached, the Commission would conduct yet another hearing to determine whether the agreement reached as a result of the discussions should itself be approved. The Commission submits that such a procedure is totally unwarranted, fosters litigation and can only unduly impede, delay and perhaps frustrate entirely the purposes and policies of the Shipping Act.

Moreover, the Commission submits that the dire predictions of the Department of Justice as to the consequences which would "inevitably" flow from the approval without hearing of such agreements is the result of a view understandably distorted by the Department's overriding concern with the antitrust laws. Thus, the Department urges that the Commission failed "to consider and evaluate a number of entirely conceivable possibilities", namely:

^{10/} This is virtually a truism, since if there is no need for prompt approval, a hearing may be held almost at leisure and whether really needed or not.

. . . (1) that the carriers may meet, exchange information, but be unable to agree upon any joint program of action to be submitted to the Commission under Section 15; (2) that the carriers may meet, exchange information and submit an agreement on joint action to the Commission, but that the Commission will be unable to approve such agreement under the criteria of Section 15; (3) that the carriers may meet, exchange information, and then proceed unlawfully to engage in concerted action without Commission approval; (4) that the carriers may meet, exchange information, and then alter their individual competition behavior, not pursuant to any combination but simply as a result of each company's changed understanding of its individual self-interest brought about by the knowledge of its competitors' sensitive cost and price data.

It is the Department's position that, "In each one of these cases, the Commission's authority to approve agreements for joint action under section 15 would not prevent the exchange of sensitive cost information from having a detrimental effect upon the subsequent competitive conduct of the participants." What the Justice Department has in mind, of course, is in antitrust parlance known as the doctrine of "conscious parallelism", and while uniform competitive conduct by businesses subject to the antitrust laws may present extremely difficult problems of detection and proof—proof that the uniformity stems from conscious but unexpressed agreement among the businesses—the Commission submits that a different situation prevails under the Shipping Act. Ease of detection is greatly enhanced by continuing staff analysis of the tariffs which every common carrier by water in the foreign commerce of the United States is required to file and which tariffs are required to contain all rates, rules and regulations which govern the cargo carryings of those carriers; and the necessity for a doctrine akin to conscious parallelism

is virtually eliminated by the provision for anticompetitive conduct in section 15.

Moreover, even if we assume that one of the "entirely conceivable possibilities" offered by the Department of Justice comes to pass, there is as Justice admits still no "certainty that the competitive behavior of the participants in the exchange will be adversely affected by the knowledge obtained through the exchange." There is, however, according to Justice, "a substantial risk that the exchange will have such an effect." Moreover, in the eyes of the Department, the Commission has failed to weigh this "substantial risk" against any valid regulatory purpose to be achieved by the approval. This is simply not true. That the situation in the trades covered is extremely volatile and potentially damaging to carriers and shippers alike is well known to the Commission, and this has been the moving force behind a number of actions taken over a substantial period of time. The onrush of the so-called container revolution, and the concomitant rise of the "intermodal" concept have provided the catalyst in all of the troublesome problems arising in the trade.

11. THE COMMISSION PROPERLY APPROVED THE AGREEMENT IN QUESTION WITHOUT HOLDING AN EVIDENTIARY HEARING SINCE PROPONENTS HAVE DEMONSTRATED A SERIOUS AND URGENT TRANSPORTATION NEED FOR THE AGREEMENTS BASED UPON UNSTABLE CONDITIONS EXISTING IN A TRADE AREA

The Department of Justice itself recognizes the impact of containerization in the trade in question by noting that, "The United States-European trade has been characterized as the life blood of containerization, generating 75 to 80% of the general cargo suitable for shipment in containers." (J.B. 4). (Citing: The Port of New York Authority Containerized Shipping: Full Ahead (1967).)

As early as 1968, the Commission was faced with a problem created by containerization. In Docket No. 68-8, Disposition of Container Marine Lines, 11 F.M.C. 746 (1968), the Commission was faced with deciding whether a container operation was subject to the jurisdiction of the North Atlantic Westbound Freight Association, a conference established in the trade from ports in the United Kingdom to North Atlantic ports in the U.S., a trade covered by the agreement at issue here.^{11/} Allegations of malpractices and rate cutting were a serious background to the proceeding.

^{11/} Container Marine Lines is a subsidiary of American Export Isbrandtsen Lines which is a signatory to Agreement No. 9899. On appeal to this Court, the case was remanded to the Commission for further hearing. North Atlantic Westbound Frgt. Ass'n v. Federal Mar. Com'n, 130 U.S. App. D.C. 122, 404 F.2d 803 (D.C. Cir. 1968).

An analogous problem has arisen because of the efforts of the North Atlantic Freight Association to thwart the extra-conference operations of Container Marine Lines by the establishment of a conference intermodal system. In Docket No. 70-16, Modification of Article 8, Agreement No. 5850 North Atlantic Westbound Freight Association, Order of Discontinuance served August 20, 1970, the Commission attempted to finally resolve the dispute between certain conference members (a dispute again abounding with allegations and rumors of malpractices) by ordering an amendment to the Conference's basic agreement.

More recently, the Commission has issued a series of orders which clearly demonstrate its awareness of the troubles besetting the trades in question. Based on investigatory efforts of the Commission staff, an order for the production of certain documents was served on Seatrain Lines. The order was issued on September 21, 1970, pursuant to the provisions of section 21 of the Shipping Act, 1916 (46 U.S.C. 820).

On December 11, 1970, the Commission instituted two "show cause" proceedings, one against Sea-Land Service, Inc. and the other against Hapag-Lloyd, both of whom are parties to Agreement No. 9899. In explaining the reasons for the institution of the proceedings, the Commission, in a press release distributed the same day, said, "The Commission has been aware for some time of an unstable rate situation prevailing in the North Atlantic trade area." The Commission went on to say that questionable rates have been filed by other carriers and that the Commission had under

consideration the institution of similar proceedings against other carriers in the trade.^{12/}

It is quite apparent from the foregoing alone that there are serious problems in the trades covered by No. 9899, and that not only is the Commission well aware of them, it has taken a number of steps to cure them.^{13/} The approval of No. 9899 is another of those steps solely designed to in some way bring about a resolution of the conflicts plaguing the trades. If the parties themselves can bring about such a resolution, all the better. But they cannot even begin unless they may conduct meaningful discussions and, of course, meaningful discussions must be based upon an exchange of relevant information. This is all that the approval granted Agreement No. 9899 was intended to do and all that it in fact does.

Further evidence of the problems facing the North Atlantic trade is found in the following recent statements contained in response to questions submitted to the executives of the principal carriers in today's North Atlantic trade by the Container News magazine (April 1971, pp. 14-16).

Mr. Manuel Diaz, Vice Chairman, American Export Isbrandtsen Lines, stated:

^{12/} Subsequent to the Commission's press release of December 11, 1970, three additional orders to show cause were instituted against American Export Isbrandtsen Lines, Inc. (Docket No. 71-3), Atlantic Container Lines, Ltd. (Docket No. 70-52) and Seatrain Lines, Inc. (Docket No. 71-1).

^{13/} All of the most recent actions were, of course, the result of information produced by the Commission's investigatory efforts. Much of this information cannot be made public without jeopardizing future regulatory efforts to restore stability to these troubled trades. Thus, the Commission is confronted with the age-old dilemma of regulatory agencies—how to justify an action without revealing information and sources to the detriment of planned or possible future action.

. . . There is existing now and has existed for some time an over-supply of containerships on the North Atlantic trade route. The answer has to be a rationalization of service and port coverage on the part of container operators.

We feel, as an American-flag operator, that foreign-flag lines should be brought under the same degree of control by U.S. government regulatory agencies as are the American-flag carriers on the route. It is obviously easier for the government to obtain information and conduct investigations of American-flag lines residing in the United States than it is to bring under the same scrutiny the foreign-flag operators with head offices outside this country.

A rate war is of no interest to any carrier and the industry certainly has the ability to police itself. In this regard, probably the most satisfactory solution is for the lines themselves to form a pooling agreement for freight revenues on the highly competitive North Atlantic trade routes.

Mr. O.I.M. Porton, President, Atlantic Container Line, replied:

The implication that there is an oversupply of containers and containerships on the North Atlantic trade routes is correct. The situation is already out of hand. The principles and standards of fair cargo soliciting cannot be maintained. There is already a rate war. Major American and European lines are endeavoring to find a solution which is acceptable to everyone and which will stabilize the trade. This, however, is likely to take a long time. The industry can apparently not police itself without government interference.

Mr. Jacques Leblanc, President, Dart Containerline, stated:

Let's face it: There's already container over-supply and over-tonnage on the North Atlantic trade route, and its going to get an awful lot worse before it gets better, especially when you consider the huge container vessels currently planned for 1971 and 1972.

I think an awfully big part of the problem is the flock of relative newcomers and "high flyers" who have gone into this particular trade looking for the quick buck and found they simply don't have the financing, the experience and the personal service contacts and dedication to follow through in the long pull. I will predict there's going to be a major "shake-out" and the few companies that remain will be the ones who know the business top and bottom.

There is a silver lining, though in this crisis that should certainly be commented upon. Very recently the Federal Maritime Commission, in its Docket 9899, permitted for the first time members of our Conference to exchange information with the aim of rationalizing the trade and eliminating the possibility of an all out rate war, an alternative that could only hurt everyone. I think this kind of newly permitted cooperative effort is the best hope we have. (Underscoring added)

The problems in this volatile trade are not new and have been plaguing this trade. It was reported in the Journal of Commerce on August 6, 1970, that:

A dramatic change in the transatlantic services of American subsidized shipping lines was heralded yesterday by the announcement that Moore-McCormack Lines has sold its four new multi-cargo ships used on the route to American Export Isbrandtsen Lines . . . However, the overtonnaging of containerships on the North Atlantic route and a veritable rate war now developing on the route apparently prompted Moore-McCormack to dispose of the ships to AETL, which can use them profitably on the route to the Mediterranean.

Additionally, it was reported in the Fairplay International Shipping Journal of August 13, 1970, that:

The Atlantic Container Line has withdrawn from three North Atlantic Conferences -- the Continental North Atlantic Westbound Freight Conference, the 48-Hour Agreement from German Ports and the North Atlantic Westbound Freight Conference -- which set westbound freight rates from the Continent to the U.S.A. The reason cited by A.C.L. was the inability of these Conferences to be a stabilizing force for freight rates on the North Atlantic.

All of the above are but examples of the conditions in this trade that are well known to the Commissioners and the staff of the agency. The problems are so well known that in a recent press release, Representative Kyros, of Maine, warned that:

. . . unless "substantial progress" is made shortly, concerning the so called "rate war" in the North Atlantic, he will recommend that hearings be held for the purpose of exploring necessary actions by the Congress.

Unstable rate conditions brought about by "cut throat competition" and rebating are inimitable and destructive, not only to the American Merchant Marine, but are extremely detrimental to our foreign ocean borne commerce as well.

I am aware that the Federal Maritime Commission has been doing its best to force an end to chaos that prevails in this important trade which accounts for the largest general cargo movement in the world.

Unless signs of substantial progress are discernible shortly in bringing about an end in this senseless rate war I shall recommend the House Merchant Marine and Fisheries Committee to hold emergency hearings for the purpose of exploring appropriate actions by Congress. (Congressional Information Bulletin, Vol. 75-No. 60, March 29, 1971, p. 8)

Here the Commission has approved an agreement that only allows for an exchange of information and one that does not permit the dire predictions made by the Department. This exchange of information coupled with reports of all meetings and discussions, as we have noted, have been supplied to and studied by the Commission. As recently as April 22, 1971, the following progress report was submitted in conjunction with a request for a renewal of the agreement:

Signatories to Agreement 9899 are now in session in Brussels and wish to apply for an extension of said Agreement for an additional period of 30 days.

Significant progress is being made in working out details of an exceedingly complicated agreement. Since the filing of the last minutes, the lines have met in New York on April 20, London on April 21, and are now in continuous sessions in Brussels.

The lines have:

1. Appointed counsel.
2. Retained a firm of chartered accountants.
3. Reviewed and are revising the draft agreement which was previously submitted to the FMC as information.
4. Reached substantial agreement on several points.
5. Appointed working committees to deal with specific problems which committees will be working continuously until agreement is reached.
6. Scheduled meetings for May 12-15 in Lisbon and for June 1, in New York.

The Commission respectfully submits that in approving Agreement No. 9899, it carefully considered the "risk" to the public's interest, in insuring against an unwarranted invasion of the antitrust laws, by the exchange of information contemplated in the agreement against the statutory purpose of fostering an attempt by the parties to restore stability to the trades. Its approval was the result of the Commission's conclusion that the regulatory purpose outweighed whatever risk if any was involved.

III. THE ATTORNEY GENERAL, ACTING ON BEHALF OF THE UNITED STATES,
LACKS STANDING TO SEEK JUDICIAL REVIEW BASED UPON STATUTORY
CONSIDERATIONS ENTRUSTED BY CONGRESS SOLELY TO THE COMMISSION

The Commission respectfully submits that the Department of Justice has no standing to seek judicial review of the Commission's order approving Agreement No. 9899. After urging this Court to grant a stay because it is "required to prevent serious and irreparable injury to petitioner's [Justice's] interests", the Department dismisses the question of standing with a simple, "It should be noted that petitioner United States' standing in this proceeding rests upon its responsibilities with regard to the Agreement's anticompetitive aspects."^{14/} A careful consideration of the Department's argument reveals that the Department considers itself the guardian of the public's interest in insuring that anticompetitive conduct carried out under agreements approved by the Commission does not unwarrantedly encroach upon the province of the antitrust laws.^{15/} It is the Commission's contention that by seeking judicial review in the present case, the Department of Justice is taking unto itself a responsibility expressly vested by Congress in the Commission, and unequivocally recognized by this Court and the Supreme Court.

^{14/} While subsequent pleadings of the Department contain a good deal more verbiage, we submit that the ground upon which the Department "stands" in this case remains the same—shaky at best.

^{15/} In its brief, for the first time the Department hints that its interest in the case may be that of representing the interest of the government as a shipper (J.B. 46). In all other cases before the Commission where an agency such as the Department of Agriculture or the Agency for International Development has had an interest in a Commission proceeding, it has availed itself of the opportunity to appear in person.

The Federal Maritime Commission, not the Department of Justice, has been entrusted by Congress with the sole responsibility of reviewing agreements subject to the Shipping Act, 1916, to determine whether or not they should be approved and hence receive immunity from prosecution under the antitrust laws. The courts have often recognized that one of the major functions of the Commission in reviewing agreements under section 15 of the Shipping Act is to insure that the Commission approve only those agreements which do not "invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute." Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 293, 299, 211 F.2d 51, 57 (D.C. Cir., 1954), cert. denied 347 U.S. 990. See also F.M.C. v. Svenska Amerika Linien, 390 U.S. 238, 242-246 (1968). In neither of these cases, nor anywhere else for that matter, is there any indication that the Department of Justice necessarily plays any role in the Commission's determination of what agreements should or should not be approved. More importantly, it has never been suggested that once the Commission has weighed the degree of encroachment on antitrust policies against the regulatory gains to be secured by the approval of an agreement, the Department of Justice is free to challenge that approval by judicial review.^{16/}

^{16/} The Attorney General has himself many times indicated that he has no authority to challenge or reverse decisions of independent agencies or departments with respect to matters within the particular jurisdiction of those agencies or departments. See, e.g., 20 Op. Att'y Gen. 270, 272 (1891) [Civil Service Commission]; 17 Op. Att'y Gen. 332, 333 (1882) [Interior Department]; 20 Op. Att'y Gen. 711, 713 (1894) [Interior Department]; 25 Op. Att'y Gen. 93, 96 (1903) [Treasury Department]; 25 Op. Att'y Gen. 524, 529 (1905) [Interior Department]; 38 Op. Att'y Gen. 149, 150 (1934) [Veteran's Administration]; 20 Op. Att'y Gen. 440, 444, 445 (1892) [Treasury Department]; 39 Op. Att'y Gen. 67, 68 (1937) [Interior Department]; 42 Op. Att'y Gen. January 16 (1969) at 9, 10 [General Accounting Office].

That the Department of Justice should be denied any standing to impose antitrust philosophy on what is basically a regulatory problem is particularly appropriate in cases where, as here, the Department's position was fully considered by the Commission. The earlier participation in the Department in this proceeding by way of petition for a hearing prior to approval of Agreement No. 9899 was welcomed by the Commission as helpful to it in its deliberations on the subject agreement. However, once the Commission has acted under section 15 of the Shipping Act, the attempt by the Department to gain judicial review of the Commission's action in ordering approval of the agreement becomes an attempt by the government to maintain an action against itself, an activity which has consistently^{17/} been held as an improper subject for court consideration. This consistently maintained principle has been departed from only in those instances where the challenging arm of government has an interest not only adverse to the challenged arm but in fact has a position which would allow review on identical factual situations when review is sought by a private party. Thus, for example, in United States v. I.C.C. 337 U.S. 426 (1949), the United States as a shipper was allowed to challenge an order of the Interstate Commerce Commission denying the recovery of damages since a challenge would have been allowed to a private shipper:

^{17/} See, e.g., Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311 (2nd Cir. 1945), cert. denied 326 U.S. 746; Defense Supplies Corp. v. American-Hawaiian S.S. Corp., 64 F.Supp. 459 (S.D.N.Y. 1945).

. . . the Government is not less entitled than any other shipper to invoke administrative and judicial protection
Consequently, the established principle that a person cannot create a justifiable controversy against himself has no application here. (at 430, 431).

Similarly, the Secretary of Agriculture as a shipper, through the Department of Justice, was allowed to challenge an order of the Federal Maritime Board.
See Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 483, n. 2 (1958).^{18/}

Where, as here, the Department of Justice grounds its standing on its position as the guardian of the antitrust laws, and the public's interest in insuring against unwarranted invasions of the purposes of those laws, the Department is seeking only to substitute its judgment for that of the Commission. Moreover, the Department would have this Court make that substitution in a case where both Congress and the courts have placed the sole responsibility for rendering the judgment in the Commission. Under section 15 of the Shipping Act, the Commission is required to disapprove any agreement it finds to be "contrary to the public interest", and under the Isbrandtsen and Svenska cases, supra, one of the appropriate considerations under the public interest standard is a consideration of an agreement's impact upon the purposes and policies of the antitrust laws.

^{18/} Cf., S & E Contractors, Inc. v. United States, ___ Ct.Cl. ___, 433 F.2d 1373 (1970), where a challenge to the Atomic Energy Commission was allowed in the United States Court of Claims by the Department of Justice representing the United States, which had a contractual interest in the challenged transaction.

The Department of Justice's protestations notwithstanding, we submit that the concept of a "party aggrieved" in the Hobbs Act is not so broad as to permit the Department to sustain its action here. The Department is "aggrieved" here only because it disagrees with the Commission over the extent to which the "antitrust policies", as those policies are construed by the Department, should apply to agreements approved under section 15. The Department is and remains unaffected by the Commission's order. It is not required to act or refrain from acting, or for that matter alter its position, in any way. By its own admission, the Department's interest is reduced to its self-assumed role as the guardian of the public's interest in the effective administration of the policies and purposes of the antitrust laws. But this role, insofar as those policies and purposes are valid considerations under the Shipping Act, was expressly entrusted by Congress to the Commission, and we respectfully submit the proper forum for airing the Department's grievance is not this Court but the Congress.

As for the line of authorities cited by the Department, they are either inapposite as involving "interests" more substantial than a philosophical quarrel or do not raise or deal with the question of the Department's standing to seek review (J.B. 43-48). We do not, of course, wish to imply any intention to exclude the Department from participating in matters before the Commission.

As we have already said, the Commission welcomes the Department's participation in proceedings before it, and we would hope that the Department would continue to afford the Commission the inestimable value

of its views on matters of interest to it. What do not welcome and think unwarranted is the present attempt by the Department to cast itself before this Court as the regulator of the waterborne foreign commerce of the United States.

The Commission respectfully submits that the basic differences of philosophy between the antitrust laws and the Shipping Act would in all probability foster an ever-increasing flow of litigation should this Court conclude that the Department has standing to bring this action. The petition for review should be dismissed for lack of standing.

IV. CONCLUSION

The Commission respectfully requests that this Court dismiss this action because the Department of Justice has no standing to seek review of the Commission's order approving Agreement No. 9899 on the ground that it is the proper interpreter of the public interest in matters arising under the Shipping Act or, in the alternative, the Court should find that a preapproval hearing was unnecessary and affirm the Commission's order approving Agreement No. 9899.

Respectfully submitted,

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Federal Maritime Commission

Washington, D.C.
April 30, 1971

DOCKET NO. 24895

IN THE
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.)
)
FEDERAL MARITIME COMMISSION and)
UNITED STATES OF AMERICA,)
)
Respondents,)
)
AMERICAN EXPORT ISBRANDTSEN LINES,)
INC. and)
SEA-LAND SERVICE, INC.,)
)
Intervenors.)

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 30 1971

Nathan J. Paulson
CLERK

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME COMMISSION

BRIEF OF INTERVENOR
AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Dated: April 30, 1971

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DOCKET NO. 24895

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.)
)
FEDERAL MARITIME COMMISSION and)
UNITED STATES OF AMERICA,)
)
Respondents,)
)
AMERICAN EXPORT ISBRANDTSEN LINES,)
INC., and)
SEA-LAND SERVICE, INC.,)
)
Intervenors.)

BRIEF OF INTERVENOR
AMERICAN EXPORT ISBRANDTSEN LINES, INC.

PRELIMINARY STATEMENT

The petition seeks review of an order of the
Federal Maritime Commission approving an application

(Agreement 9899-1) for a three-month extension from February 24 to May 23, 1971, of a voluntary exchange of information arrangement (Agreement 9899) previously subjected by petitioner to unsuccessful challenge before this Court.^{1/} Petitioner seeks to have the extension order set aside, claiming that the Commission could not grant the extension without first holding evidentiary hearings -- a claim which has no basis in law and which this Court implicitly rejected in denying petitioner's attempts to obtain a stay of the basic arrangement.

STATEMENT OF ISSUE

Does Section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, require the Federal Maritime Commission to conduct evidentiary hearings before it may grant a three-month extension of an arrangement under which steamship operators may voluntarily exchange information to determine

^{1/} See Order of December 30, 1970, Docket No. 24895, in which this Court denied petitioner's application and motion for a stay of Agreement 9899 conditioned upon a Commission order that the parties to the agreement supply the Commission all information exchanged pursuant thereto, which condition was immediately fulfilled (Joint Appendix ("JA") 42-3). No review was sought of this Court's disposition of the matter.

whether uniform or agreed rules, practices and procedures are needed to help solve transportation problems in specified ocean trades where:

(a) Interested parties, including petitioner, were given notice of the extension application and opportunity to present their views in writing to the Commission, which opportunity was taken by petitioner (J.A. 51-4);

(b) After consideration thereof (J.A. 56), the Commission concluded that an evidentiary hearing was not required on the grounds that

(1) the basic information exchange arrangement was designed to help solve serious transportation problems (overtonnaging and rate wars) in the involved trades (J.A. 55);

(2) the exchange arrangement was under constant surveillance by the Commission (ibid);

(3) the exchanges of information provided for are voluntary (ibid);

(4) each party is free to act independently on all matters (ibid);

(5) any agreements reached must be filed with and approved by the Commission before implementation (ibid);

(6) petitioner advanced no new matter which would require a hearing on the application to extend (J.A. 56);

(7) the conditions which warranted initial approval of the basic arrangement still exist (ibid);

(8) the parties have exchanged information in an attempt to reach solutions to the problems in the involved trades (ibid);

(9) the parties have filed reports with the Commission explaining in detail each exchange of information and discussion (ibid);

(10) the parties are considering a pooling agreement as a possible solution to the existing transportation problems (J.A. 56-7);

(11) further discussions and exchanges appear to be necessary to bring to fruition the intent of the basic arrangement and the Commission's reasons for initially approving it (J.A. 57);

(c) The Commission further found, after examination, that the extension would not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers

or ports; or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or contrary to the public interest, or violative of the Shipping Act, 1916 (ibid); and

(d) The Commission limited the subject of the information exchanges and discussions (J.A. 58) and adopted this Court's condition that every exchange, discussion or agreement pursuant to the arrangement be reported promptly to the Commission in writing with copies of all information exchanged (J.A. 57)^{2/}

STATEMENT OF THE CASE

Intervenor, American Export Isbrandtsen Lines, Inc., ("AEIL") is engaged in the North Atlantic container-ship trade. That trade, the Commission noted and petitioner does not dispute, has been experiencing "acute

^{2/}To avoid burdening the Court unnecessarily, this brief does not deal with the further issue set forth in Petitioner's Brief (p. 2): "Whether the Attorney General, acting on behalf of the United States, has standing to seek review of the Commission order as a 'person aggrieved.'" In no sense does this signify acquiescence in petitioner's views with respect thereto.

problems involving overtonnaging, instability and malpractices" (J.A. 24). In order to explore and develop possible solutions, AEIL and six other companies in the trade entered into Agreement 9899 providing for the exchange of pertinent data on a voluntary basis (J.A. 1-3). Because some felt it appropriate to do so out of an abundance of caution, Agreement 9899 was submitted to the Commission for prior approval.^{3/}

The Commission obtained the comments of the Department of Justice and others and, after considering

^{3/} Petitioner itself points out that the preliminary nature of Agreement 9899 may have made it technically unnecessary to obtain such advance approval:

"Since Section 15 gives the Commission authority to approve conference agreements, pooling agreements and other such restrictive agreements upon appropriate findings, it is reasonable to infer that in normal circumstances persons subject to the Shipping Act have the right to meet, discuss and negotiate such a proposed agreement without the need for a prior authorization by the Commission under Section 15." (Petitioner's Brief 19).

Peculiarly, far from commending the participants' desire to make absolutely certain that they were proceeding lawfully and in conformity with the public interest, petitioner seems displeased that they were not more daring (id. at 20).

them (J.A. 22), concluded that an evidentiary hearing was unnecessary and that Agreement 9899 should be approved subject to certain limitations and restrictions which it imposed (J.A. 24-6). Its rejection of the Justice Department's request for evidentiary hearings was carefully reasoned and based upon the very limited nature of the arrangement.

I. The Arrangement is Preliminary and Not Restrictive

As the Commission explained:

"Nothing in the agreement authorizes the parties to implement any program, understanding or arrangement based upon information resulting from the contemplated exchanges until such a plan is filed with, and approved by, the Commission and any other concerned Government agency" (J.A. 22)

* * *

"No action in implementation of any arrangement reached in pursuance of this agreement may be taken without itself being submitted to and being approved by this Commission. Nothing more than permission to discuss and exchange data is herein sought; no action is contemplated" (J.A. 23).

In addition, nothing about this preliminary arrangement is in any way restrictive. Thus, no one is forced to do anything and others in the trade may freely participate in discussions and exchanges of information (J.A. 22). The Commission made clear:

"The signatories' exchange and development of information is on a voluntary, not a mandatory, basis; any party may refrain from giving information and is free to continue or alter its present rates, rules or practices" (J.A. 23).

2. The Arrangement is Subject to Continuous Surveillance With the Commission Kept Abreast of All Information Exchanged and All Discussions

The arrangement is also to be performed in a fishbowl atmosphere. Under the Commission's order

"each and every exchange, discussion or agreement transacted under the terms of this agreement shall be reported in writing to the Commission within ten (10) days of such occurrence. Such report will be rendered in a form adequate to fully inform the Commission of the topics discussed and shall contain ten (10) copies of all information exchanged as well as the time such discussion and exchange took place" (J.A. 57).

Moreover, as the Commission properly emphasized (J.A. 23):

"The agreement is one within the context of a regulated industry ****All approvals under section 15 are granted in the full light of the Commission's continuing jurisdiction over and surveillance of the actual conduct of the parties under the agreement."

3. The Arrangement is Limited in Scope and Duration

Because the Commission concluded that "the same lack of order does not appear to presently exist in the trades to and from Mediterranean ports" (J.A. 24), it

provided that no information, exchange or discussion relate to that trade (J.A. 58). It thus confined the arrangement to areas where there were "serious transportation problems" and where it was important not to "delay for an unwarranted time action upon an agreement aimed at seeking solutions as rapidly as possible to immediate concerns" (J.A. 24).

Furthermore, the arrangement is not of unlimited or extended duration. It is effective for only three months, with a formal renewal procedure required to continue it for an additional three month period (J.A. 57). Under that procedure, the Justice Department was able to, and did, submit comments relating to the renewal (J.A. 51) which were fully considered by the Commission but which, as the Commission observed, "advanced no new matter which would require a hearing on the application to extend" (J.A. 56)

ARGUMENT

THE COMMISSION WAS NOT REQUIRED TO CONDUCT EVIDENTIARY HEARINGS BEFORE APPROVING EXTENSION OF THE INFORMATION EXCHANGE ARRANGEMENT

The essence of petitioner's argument in this case is the claim that because the preliminary information exchange arrangement was submitted to the Commission, an evidentiary hearing was required as a matter of law before it could receive approval under Section 15 and before it could be

extended for a three month period. This is not the law and, unless the administrative process is to be so rigidified as to defeat performance of its statutory functions, it cannot become the law.

A. Agencies Are, and Must Be, Able to Act Without Evidentiary Hearings

This Court had occasion just within the past year in Medical Committee for Human Rights v. SEC, 432 F.2d 659, 668-69 (D.C. Cir. 1970), to comment on the importance of judicial "deference to the efficient deployment of administrative resources." It observed:

"agencies frequently are confronted with situations in which substantial questions of fact, law, or policy may be properly resolved through information-gathering mechanisms less cumbersome than a trial-type hearing. This court has consistently recognized that this kind of flexibility in procedures is a desirable attribute of the administrative process, regardless of whether the power was explicitly provided by statute or rule, or was evolved on an ad hoc basis by implication from a broad statutory grant."

This observation reflected the long standing and continuing directions of the Supreme Court on the subject.

E.g., American Farm Lines v. Black Bull Freight Service, 397 U.S. 532, 538 (1970):

"The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems."

Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n, 356 U.S. 282, 287 (1958):

"we never presume that Congress intended an agency 'to waste time on applications that do not state a valid basis for a hearing.'"

B. Petitioner's Claim That This Court Adopted An Inflexible Evidentiary Hearing Requirement Is Erroneous

Petitioner's argument rests on the assumption that this Court in Marine Space Enclosures v. FMC, 137 U.S. App. D.C. 9, 420 F.2d 577 (D.C. Cir. 1969) and City of Portland v. FMC, 433 F.2d 502 (D.C. Cir. 1970), abandoned over 50 years of administrative law and adopted an inflexible reading of Section 15 so as to require an evidentiary hearing whenever Commission approval is sought.

Needless to say, petitioner's assumption cannot survive examination of the cases. Indeed, this Court went out of its way to make emphatically clear that it was not adopting an inflexible rule and that whether and what type of hearing is appropriate will continue to depend upon the particular circumstances.

Thus, Marine Space explicitly indicated that if an agreement is routine or the Commission makes an appropriate determination that its impact on commerce is de minimis, no hearing of any kind may be required. (420 F.2d at 584). Even where the situation is otherwise and some hearing is appropriate, this does not mean, as the Court again expressly pointed out, that the hearing must be an

evidentiary one (420 F.2d at 589).⁴ This will depend "on the nature of the issues" (ibid.). To make certain that the significance of this point could not be missed, the Court went to the trouble of citing a long string of cases "approving disposition without evidentiary hearing" (ibid.).

Again, in City of Portland, this Court added to the list of situations where no hearing of any kind need precede approval:⁵

"There may be room for the Commission to issue approvals without a hearing on a provisional basis -- for a limited time, pending the conduct of a hearing and subject to protective conditions.*** This might be available in the public interest, to take care of emergencies, or possibly even to gather the important

⁴In making this point, this Court cited Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969), where the meaning of the term "hearing" was explained as follows:

"Parties are normally assured a 'hearing' but that term does not demand that the communication be oral and audible, *** The requisites of that portion of due process described as 'hearing' are satisfied by providing the parties with the opportunity of affirmatively advancing argument with supporting authority and a like opportunity for response and counter-argument by the adversary." (Id. at 1162).

⁵Although the circumstances in City of Portland called for a hearing (involving as it did the drastic consequence of foreclosing Portland from continuing as a port of call), this Court nevertheless refrained from promptly staying the Commission's order which had been rendered without any hearing and authorized expedited hearing.

information from the actual operations of an experiment which would not be meaningfully available solely from a hearing. Compare American Airlines, Inc. v. CAB, 123 U.S. App. D.C. 310, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843 (1966)" 433 F.2d at 504.⁶

- C. In the Context of This Preliminary and Limited Arrangement, the Commission's Procedure, Including Affording Petitioner an Opportunity to Submit Comments and Have Them Considered, Was Well Within its Proper Discretion

In dramatic contrast to the City of Portland and Marine Space Enclosures agreements (the latter involving "all-encompassing restraints" "lasting in excess of 70 years," 420 F.2d at 585, 581), the arrangement involved here

⁶In the cited case, American Airlines, this Court expressly recognized:

"It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience. Although CAB's regulation is not temporary in the sense of being expressly limited in duration, the Board's findings plainly reflect its assumption that the regulation was intended to be subject to re-examination. The Board's regulations provide that 'any policy may be amended from time to time as experience or changing conditions may require.' 14 C.F.R. § 399.4. In any event, it is the obligation of an agency to make re-examinations and adjustments in the light of experience." 359 F.2d at 633.

falls squarely within those situations where an agency may properly determine that no hearing is required.

As shown above, the present arrangement is provisional, limited in time and scope, not restrictive⁷ and subject to protective conditions and to continuous Commission surveillance. The Commission afforded the Justice Department ample opportunity to submit comments and it accorded those comments serious consideration. Under the circumstances, including the extremely urgent need for continuing the search for a solution to the acute transportation problems without delay, the Commission need do no more.

⁷ Petitioner's sole claim of possible antitrust consequences is purportedly based upon United States v. Container Corp. of America, 393 U.S. 333 (1969) and American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) which, as the Commission explained in approving the basic arrangement, are readily distinguishable (J.A. 23). Indeed, petitioner itself noted that "exchanges and cooperative efforts to develop additional information and standards of operation may dispel ignorance as to market conditions thereby improving the quality and vigor of competition and providing public benefits in terms of price and quality of service" (J.A. 10). They certainly are not, without more, violative of any antitrust laws, as the very cases cited by petitioner demonstrate. Yet petitioner's only response is to conjecture some vague, unspecified risks which it grudgingly concedes are "perhaps not exactly the same risks" as in unregulated industries (Pet. Br. 27). This is hardly a sufficient showing to warrant interference with the agency's determination, particularly in light of the Commission's express statement that it fully considered the "effects thus far of Agreement No. 9889" when it approved the renewal for an additional three month period (J.A. 56).

CONCLUSION

When this matter was before the Court last December, it was fully mindful of its recent decisions in Marine Space and City of Portland and of all petitioner's arguments now reiterated again. Petitioner's contentions were rejected and its attempt to stay the arrangement denied. We respectfully submit that this Court's disposition was eminently correct then and remains correct today.

Respectfully submitted,

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